Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

EVANDRO S. SANTINI, *et al.*,

Petitioners,

v.

CONNECTICUT HAZARDOUS WASTE MANAGEMENT SERVICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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July 27, 2004

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QUESTIONS PRESENTED

1. Did the Second Circuit err in interpreting *Agins v. Tiburon*, 447 U.S. 255 (1980), and *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987), as holding that "precondemnation activity" is categorically exempt from liability under the Takings Clause of the Fifth Amendment?

2. Did the Second Circuit contravene several decisions of this Court by holding that an agency's proposed condemnation of an under-construction subdivision for public use as a radioactive waste disposal facility, which action continued for eleven months and undisputedly reduced the property's value from approximately $2 million to zero for at least 24 months and undermined a $5 million equity investment, was not a taking on the grounds that it was incomplete "regulatory" action of "short duration," and protecting the condemnation process from liability was "sound public policy?"

PARTIES TO THE PROCEEDING

The parties to this case are:

Plaintiffs/Petioners:	Evandro S. Santini Alfred Drive Tolland, Connecticut 06084
	Santini Homes, Inc. 1031 Hartford Turnpike Vernon, Connecticut 06066-4407
Defendant/Respondent:	Connecticut Hazardous Waste Management Service 60 Columbus Boulevard Fourth Floor Hartford, Connecticut 06106

RULE 29.6 STATEMENT

Santini Homes, Inc. is a closely-held corporation, and has no parent or subsidiary corporations.

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PETITION FOR A WRIT OF CERTIORARI

Evandro S. Santini of Tolland, Connecticut and Santini Homes, Inc. of Vernon, Connecticut respectfully petition this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Second Circuit is published at 342 F.3d 118 (2003) and reprinted in the Appendix ("App.") beginning at 1a. The opinion of the U.S. District Court is unpublished but appears in the Appendix beginning at 28a.

The opinions issued in the state court proceedings that preceded this action are published at 1998 WL 422166 (Conn. Super. 1998) and 739 A.2d 680 (Conn. 1999).

JURISDICTION

The opinion of the U.S. Court of Appeals for the Second Circuit was published August 28, 2003. Plaintiffs' Petition for Panel Rehearing was denied on April 2, 2004, App. at 42a. On June 18, 2004, this Court extended the time for filing this petition to July 30, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION

The Takings Clause of the Fifth Amendment to the U.S. Constitution provides: "[N] or shall private property be taken for public use without just compensation."

INTRODUCTION

This case warrants a writ of certiorari for two reasons. First, a federal appeals court, denying a claim brought under the Fifth Amendment for a taking of land without just compensation, interpreted two decisions of this Court as stating a broad, categorical, but undefined exemption from takings liability for "precondemnation activity," and in doing so directly contradicted two other decisions of this Court which hold that takings claims are to be adjudicated using a three-factor balancing test, not categorical rules. Second, the opinion below reveals a pervasive misunderstanding of this Court's most important and recent takings jurisprudence, including (1) the meaning of and relationship between the three takings factors; (2) the difference between a taking claim arising from use of condemnation for a public purpose and from police-power regulation of private land use; (3) the importance of focusing on the impact of government action on the property owner and not whether the action is intentional or complete; and (4) the difference between government action that is temporary from the outset and action that causes a taking which becomes temporary because government later rescinds or abandons.

In *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978), this Court established a three-factor analysis for a taking of property without just compensation under the Fifth Amendment: (1) economic impact of the governmental action on the property owner; (2) interference with the owner's distinct, investment-backed expectations; and (3) character of the governmental action. In its most recent takings decisions, this Court has identified *Penn Central* as the primary

framework for adjudication of taking claims, describing it in *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001), as the "polestar," and declining in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), to adopt categorical rules in lieu of a case-by-case, three factor analysis. With *Penn Central* so anointed, the meaning and balancing of the factors have become the most important substantive issues under the Fifth Amendment Takings Clause.

In June 1991, the petitioners were finishing the construction of the first phase of a 100 lot residential subdivision in Ellington, Connecticut. They had obtained several years earlier all necessary permits, and as of mid-1991 had spent $5 million on construction, thus vesting (under Connecticut law) the rights granted by those permits. However, on June 10, 1991, a quasi-state agency, after secret deliberations, announced that it had selected the Santini subdivision as one of three finalists (the other two sites being nearby) for condemnation for public use as a disposal facility for radioactive waste generated by in-state hospitals, utilities, universities, and corporations. In late June, the Santini subdivision was featured on the front page of the *Hartford Courant* next to the international symbol for radioactivity.

The announcement spawned a huge public outcry that resulted, eleven months later, in the Connecticut legislature repealing its mandate to the agency to condemn an in-state facility. By this time, however, the damage had been done to Santini and his property: it is undisputed in this case that, notwithstanding its revocation eleven months later, the designation *per se* for condemnation destroyed all economically productive use of Santini's $2 million property and undermined petitioners' $5 million equity investment for at least

24 months, from June 1991 through June 1993. That is, the stipulated record of this case contains the *concurring* opinion of the defendant agency's expert real estate appraiser who testified that, as a result of the agency's June 1991 action, the petitioners were unable to generate any revenue for two years from their completed houses, finished lots, or remaining acreage.

Santini sued in state court for compensation for a temporary taking and lost. In 2001, he commenced this action in federal district court, which dismissed the claim under the *Rooker-Feldman* doctrine, res judicata, and collateral estoppel. In August 2003, the Second Circuit reversed the jurisdictional dismissal and reached the merits of Santini's Fifth Amendment taking claim (the first court to do so), and rejected the claim for two reasons: First, the court interpreted *Agins v. Tiburon*, 447 U.S. 255 (1980), and *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 487 U.S. 302 (1987), as stating a categorical exception from takings liability for "precondemnation activity" – a term which it did not define. The court then addressed Santini's taking claim under *Penn Central*. It held that the character of the agency action was dispositive; it concluded that "whatever the economic impact," Santini had no taking claim because the agency did not complete the acquisition, the agency's mandate was revoked after eleven months, and the agency's action constituted "regulatory" action, *i.e.*, the use of the police power to restrain private land use for the public's benefit. The court also stated that protecting the condemnation process from takings liability was "sound public policy."

In interpreting *Agins* and *First English* as stating a broad yet undefined categorical defense to takings liability, the Second Circuit highlighted a direct conflict

among decisions of this Court. In denying Santini's taking claim, the Second Circuit:

- distorted the *Penn Central* test by giving dispositive effect to the third factor while ignoring economic impact and investment-backed expectations;
- contradicted *Tahoe-Sierra's* express explanation that when the governmental action is condemnation for public use as opposed to restraint of private use through regulation, the third *Penn Central* factor weighs heavily in the property owner's favor;
- violated *Penn Central* by focusing on the duration and completeness of the condemnation process instead of the impacts on the property owner; and
- ignored the plain applicability of *Armstrong v. U.S.*, 364 U.S. 40 (1960), which holds that a primary purpose of the federal Takings Clause is to ensure that no individual is forced to bear a substantial economic burden on behalf of the public.

In short, the Second Circuit misunderstood the *Penn Central* analysis and this Court's critical distinctions and recent explanations about its applicability and balancing process. These core issues are of national concern because they underlie not only claims brought under the Fifth Amendment but also every taking claim raised under state law, because the federal Takings Clause furnishes a minimum, national standard for the adjudication of takings claims. *See Mills v. Rogers*, 457 U.S. 291 (1982); *PruneYard Shopping Center v. Robins*, 447

U.S. 74 (1980). In an area of the law in which judges and commentators have appealed for years for clarity, the Second Circuit's opinion is an unfortunate step backward that warrants review.

STATEMENT OF THE CASE

1. ***Designation of the Santini Subdivision for Condemnation as a Radioactive Waste Disposal Facility, 1991-93.*** Evandro S. Santini has built single-family homes and apartments for almost 40 years in the eastern suburbs of Hartford, Connecticut. He founded Santini Homes, Inc. ("SHI"), the construction arm of his business, in 1970, and has been its president and treasurer ever since.

From 1984 through 1991, Santini and SHI (hereinafter "Santini") developed the first phase of a residential subdivision on 74 acres in Ellington, Connecticut, 20 miles northeast of Hartford. This effort began when Santini purchased 20 acres in 1984 for $147,500. In January 1985, he obtained all necessary permits for a 16 lot subdivision on this parcel, called "Ellridge Estates." Sanini then installed the subdivision's infrastructure at a cost of more than $500,000. In March 1988, Santini purchased an adjoining 54 acre parcel for $1,075,000. With this second parcel, he had in place the land for his overall plan to construct larger homes on the 16 lots and develop the remaining 54 acres with smaller lots and more modest homes. Neither parcel contains wetlands, watercourses, or other environmental resources that might restrict development.

Santini began construction of model homes in Ellridge Estates in 1987. The work proceeded slowly because Santini was completing another development

and the real estate recession of 1987-91 had taken hold in New England. Santini, therefore, assembled financing, equipment, and personnel, completed model homes, undertook preliminary engineering on the 54 acre parcel, and awaited an upturn in the market. By 1991, Santini had invested $5 million of his own money and had borrowed $4.7 million specifically for the Ellington project. In mid-1991, the upturn in the market commenced. By early June, Santini had identified buyers for two homes.

The Connecticut Hazardous Waste Management Service ("Service" or "agency") is "a public instrumentality and political subdivision" of the State, but not a state agency. *See* Conn. Gen. Stat. §22a-134bb(a) (1999). The Service's principal duty is to oversee the handling and disposal of radioactive materials, including the identification, acquisition, and construction of an in-state disposal facility. *Id.* §§22a-163c *et seq.* (1999).

"Low-level" waste remains radioactive for approximately 500 years after its use and is extremely hazardous to human health. The term "low-level" only serves to distinguish the waste from material such as spent fuel rods from nuclear power plants.

Connecticut's mandate to the Service to acquire an in-state disposal site was the direct result of a federal requiement to develop new state or regional disposal facilities. *See* Pub. L. No. 96-573, 94 Stat. 3347 (1980), codified at 42 U.S.C. §§2021b *et seq.* This mandate was accompanied by the threatened imposition of severe financial penalties on any state that did not meet certain deadlines. Connecticut adopted facility development legislation principally in 1987, Public Act 87-540. The Service then commenced its site selection process. It is undisputed that the Service's site selection process was

conducted in secret, in order to shield it from influences other than geologic and environmental data. Santini, therefore, had no notice that during 1989-91, his property was being secretly targeted for public use.

On June 10, 1991, the Service announced that it had designated the land on which Santini was building as one of three finalist sites for the disposal facility. The other two sites were in close proximity. On June 30, 1991, a map of the Ellridge Estates development appeared on the front page of *The Hartford Courant* next to the international symbol for radioactivity. In late 1991, one of the other two sites was eliminated from consideration.

Two undisputed aspects of the agency's June 1991 action warrant emphasis. First, the announcement was not the beginning of the condemnation but nearly the end; the agency was under a legislative mandate to take title to a disposal site. *See* testimony of Susan Shimelman, Undersecretary of Connecticut Office of Policy and Management, App. at 44a. Second, notwithstanding this mandate, the agency had several federal and state permits to obtain before it would complete the acquisition. At the time of the condemnation announcement and in the months following, the agency had no idea how long that process might take, *see* testimony of Ronald Gingerich, Executive Director, App. at 45a. Thus, acquisition for public use was mandatory, but the timetable was unknown.

Residents and public officials in Ellington and surrounding towns reacted angrily to the June 1991 announcement. In response, Governor Weicker proposed in early 1992 a revocation of the statutory requirement

that the Service condemn a disposal site, in favor of having a municipality volunteer a site. The legislature eventually adopted the revocation, and the Governor signed it on May 5, 1992, Public Act 92-45.

2. ***Santini's State Court Action, 1994-2000.*** Santini brought a temporary taking claim in 1994. Because this Court held in *Williamson County* that a Fifth Amendment takings claim is not ripe until a property owner has sought and been denied just compensation in the state system, Santini sued in state court and sought just compensation under the takings clause of the Connecticut Constitution, Article First, § 11.

Santini has pursued this case through more than ten years of litigation because of one undisputed fact that emerged from the trial in the state court: the real estate appraisers retained by each party to evaluate the economic impact of the condemnation designation on the Santini property agreed that for 24 months following the agency's June 10, 1991 action, Santini could not generate *any* revenue from his land or development. Santini's appraisal witness concluded that the property's value on June 10, 1991 was $2.6 million, but after the designation this value "effectively vanished," and this continued for at least 24 months. *The appraiser retained by the Service concurred,* stating in his report (emphasis added):

> The June 10, 1991 designation of the Santini properties in Ellington as being part of, or immediately adjacent to, a potential site for a low-level radioactive waste disposal facility in Connecticut lasted for 11 months, until May 1992. During that period of time, no sales of any portion of Ellridge Estates (vacant lots within the designated site areas of the facility, or vacant houses, immediately abutting the

> designated site area) could reasonably be expected to have occurred. Moreover, no development activity on the [54 acre] Pinney Street property could reasonably have been expected to occur. . . .
>
> *[We] recognize that the announcement by CHWMS effectively halted any reasonable marketing or development efforts on the part of Santini, as long as the designation as a potential site for the low-level radioactive waste disposal facility was in effect . . . . [W]e have concluded that the most likely start-up date for effective marketing and sales in the three segments of the Santini properties in Ellington would be June 1993.*

Thus, since the 1998 state court trial, plaintiffs' taking claim has been based upon the extraordinary and judicially binding (*see* n.12, *infra*) concurrence of the parties' expert witnesses that the Service's June 10, 1991 condemnation designation, although formally in place for "only" eleven months, effectively destroyed the property's value for no less than 24 months.

At the state trial, the appraisers also calculated just compensation that would be due if a taking had occurred. Each compared revenue from the subdivision had it continued uninterrupted from June 1991 through June 1993 with the lack of revenue from property as economically idled for 24 months. Both utilized the same discount rate; they differed only on the projected prices of the completed homes and finished lots and how quickly they would have sold absent the agency's actions. Each expressed his final calculation as a "before and after" value: the plaintiffs' appraiser, Edward Heberger, stated the property's value as of June 1991 as $2.6 million; zero for the next 24 months; and after June 1993, as a result of the 24 months of forced inactivity,

$1.9 million, resulting in just compensation of more than $700,000. The Service's appraiser, Dr. William Kinnard, testified that uninterrupted sales would have been slower in 1991-92 due to market conditions. He concluded that the June 1991 value was $1.7 million; Santini could generate no revenue for the next 24 months; and the "after" value was $1.5 million, just compensation being $215,000. These calculations, however, *did not* measure diminution in value; in fact, these were damage calculations premised on the mutual conclusion that the property lost all of its value from June 1991 to June 1993.

The Connecticut Superior Court, in 1998, held that Santini could not claim a taking as a matter of law because the June 1991 designation was merely part of the State's planning process, and a taking cannot occur unless "the State's intent to condemn the property in question has become fixed and irreversible," which it found had not happened. The trial court also stated in *dictum* that the property had retained "some value" during the condemnation.[1]

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[1] Although it did not explain this remark, the state trial court apparently was referring to three parts of the trial record. First, in August 1992 (three months after the revocation), at the urging of his construction lender, Santini attempted – unsuccessfully – to rejuvenate his moribund development by essentially giving away one of the constructed homes. The sale agreement stated a "purchase price" of $550,000, but Santini took back three mortgages totaling $495,000, and as *seller* paid $50,000 *to the buyer* at the closing. Neither appraiser regarded this transaction as arms-length or evidence of market value. Second, in March 1992 Santini received an oral offer to purchase one home at a significant discount, but the offer was never accepted. Such an offer is not evidence of market value, *see, e.g., U.S. v. 10,031.98 Acres*, 850 F.2d 634, 637 (10th Cir. 1988). Third, in December 1991, while considering a forecloser on its load to Santini, a construction lender

[footnote continued]

The Connecticut Supreme Court (in a 5-2 en banc decision) affirmed the denial, on different grounds. 739 A.2d 680 (1999). It held that "mere governmental planning and temporary steps in anticipation of condemnation" do not, as a matter of state law, constitute a taking. *Id.* at 681, 687. Because the Service's action "did not go beyond such planning," it was "not necessary to discuss the plaintiffs' factual claims [of economic impact] . . . ."[2] *Id.* at 688 n.19. The court declined to regard this Court's takings jurisprudence as a minimum standard for interpreting the Connecticut Constitution, calling this Court's decisions "irrelevant." *Id.* at 688 n.20. The opinion then stated that *First English* validated the majority's holding that mere government planning is never a taking, because it recognized a categorical exclusion from takings liability for "depreciation in the value of property by reason of preliminary [government] activity . . ." *Id.* at 690.

In March 2000, Santini petitioned this Court for a writ of certiorari, presenting two questions: (1) whether a state court, adjudicating a taking claim brought in state court under state law as required by *Williamson County*, must regard this Court's decisions interpreting the federal Takings Clause as minimum standards; and (2) whether the Connecticut Supreme Court, by dismissing this Court's decisions as "irrelevant" and by adjudicating

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procured an appraisal of one of the model homes; the document listed a value of $400,000, but this was contingent on repeal of the Service's condemnation designation. Thus, none of this evidence remotely demonstrated economic use during or after the condemnation designation or after its revocation.

[2]Thus, the Connecticut Supreme Court effectively vacated the trial court's discussion of whether the property had retained value during or after the condemnation.

Santini's takings claim without even reaching economic impact, had violated the federal Takings Clause. That petition was denied, 530 U.S. 1225 (2000).

3. ***Santini's Federal Court Action.*** Santini then brought this taking claim in federal district court under the Fifth Amendment and 42 U.S.C. §1983. The parties stipulated to use of the testimony (including the respective, concurring appraisers' testimony) and exhibits from the state court action as the record for the federal action for the purpose of determining liability for a taking. The Service then filed a motion to dismiss on the grounds of lack of finality under *Williamson County,* the *Rooker-Feldman* doctrine, *res judicata,* and collateral estoppel resulting from the state court proceedings. The Service also sought summary judgment on the merits. Santini, in turn, filed a motion for summary judgment on the merits. On August 27, 2002, the court granted the Service's motions, accepting its jurisdictional arguments, and denied Santini's motion, App. at 28a.

4. ***Santini's Appeal to the Second Circuit.*** On appeal to the Second Circuit, the parties' briefs primarily addressed the district court's jurisdictional dismissal, with Santini arguing that the dismissal should be reversed and the matter remanded for a decision on the merits. The Second Circuit reversed the district court on the jurisdictional issues, accepting Santini's argument that he had proceeded in state court involuntarily and was prohibited in that forum under both *Williamson County* and Connecticut case law[3] from litigating a Fifth Amendment taking claim.[4] App. at 10a-22a.

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[3] *See Melillo v. New Haven,* 732 A.2d 133, 154 n.28 (Conn. 1999); App. at 15a.

[4] Thus, the court agreed that *Rooker-Feldman* and *res judicata* did not bar federal jurisdiction. The Second Circuit also

[footnote continued]

Notwithstanding that the district court had not reached the merits, the Second Circuit decided the taking claim, denying it on two grounds. First, the court interpreted *Agins* and *First English* as "explicitly [holding] that pre-condemnation activities do not constitute takings." App. at 23a. The Second Circuit quoted from *Agins*, 447 U.S. at 263 n.9:

> Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decision-making, absent extraordinary delay, are incidents of ownership.

App. at 23a. It then adverted to the statement in *First English*, 482 U.S. at 320, that "depreciation in value of property by reason of preliminary activity is not chargeable to the government." App. at 23a. Because the agency's June 1991 condemnation announcement was "but one step of many that the state[5] had to pursue before it could condemn[6] Santini's property," its action

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announced a rule, to be applied prospectively, for takings plaintiffs proceeding involuntarily in state court, directing them to file in the state action an express reservation of the Fifth Amendment claim. The court cited *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), as the procedural basis for this requirement, which it dubbed a "Santini reservation." In imposing this rule, the Second Circuit expressly disagreed with the Third, Fourth, Sixth, Ninth and Tenth Circuits. App. at 15a-22a.

[5] As noted earlier, the defendant Hazardous Waste Management Service, by statute, is a quasi-public entity and not a state agency.

[6] By this word, of course, the court meant to "take title"; there is no dispute that the agency in June 1991 was initiating the use of statutorily-delegated eminent domain powers.

was "prototypical precondemnation governmental activity," and thus as a matter of law not a taking. *Id.* at 23a-24a.

The Second Circuit then turned to the *Penn Central* test.[7] *Id.* at 24a. It found that Santini could not show a loss of all economically viable use because of this Court's holding in *Tahoe-Sierra*, 535 U.S. at 332, that "[a] fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted."[8] App. at 24a, 25a. Despite explanations in the appeal briefs intended to avoid any misunderstanding, the court also mistook the appraisers' calculations of just compensation as measures of decline in the fair market value of the property, attributing to Dr. Kinnard, for example, testimony that the condemnation had reduced the property's market value by $215,000. *Id.* at 8a. On the apparent basis of these findings, the court found that the Service's action had only had an economic impact on Santini and interfered with the petitioners' investment-backed expectations "to some extent."[9] *Id.* at 25a.

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[7] In its decision, the Second Circuit also addressed Santini's taking claim under the categorical rule of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (governmental action that results in a total loss of economically beneficial use constitutes a taking regardless of government's justification, unless the owner's proposed use is a nuisance or barred by underlying real property law principles). App. at 24a. The petitioners concede that *Tahoe-Sierra*, 535 U.S. at 329, restricts the *Lucas* categorical rule to permanent takings, and is thus now inapplicable to this temporary taking case.

[8] In finding that the property was not rendered valueless, the court made no mention of the concurring expert testimony of the real estate appraisers.

[9] The court also referred to the Connecticut trial court's inexplicable and plainly erroneous dictum that "None of the

[footnote continued]

The court then set aside the first two *Penn Central* factors, holding that the third prong, the character of the governmental action, was "of principal importance and fatal to the taking claim," in four ways: (1) like the moratorium in *Tahoe-Sierra*, the restriction on property use here was temporary; (2) because the condemnation process had been terminated by the legislature eleven months after the June 1991 designation, overruling of the agency was "relatively swift," and "duration of the restriction is one of the most important factors that a court must consider in the appraisal of a regulatory taking claim, *Tahoe-Sierra*, 535 U.S. at 342"; (3) because the agency's condemnation action was "regulatory," this case is governed by the "legion of cases" that have upheld land use regulations and permit denials against takings claims, even where property value diminished substantially, citing *Park Avenue Tower Assoc. v. City of New York*, 746 F.2d 135, 139 (2d Cir. 1984); and (4) protecting the condemnation process from takings liability constitutes "sound public policy" by allowing agencies to plan for public uses without encouraging secrecy. App. at 25a-27a. Underscoring that it be considered the character of the agency's action to be dispositive, the court concluded, "[Whatever] the economic impact of the siting announcement upon Santini's property, no compensable taking occurred." *Id.* at 26a.

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experts said plaintiffs' land had no economic or productive use . . . ." App. at 24a. Further, in direct contravention of Santini's claim, the appraisers' concurrence, and the court's own earlier statement ("Notwithstanding [the revocation], Santini's property remained economically idle until mid-1993, *id.* at 7a), the court asserted that Santini had acknowledged that the property "recovered some of its value after the siting announcement was withdrawn."

5. ***Santini Petition for Panel Rehearing.*** Santini filed a petition for rehearing on the grounds that the opinion: (1) inexplicably ignored the concurrence of the parties' appraisers about total loss of economic use; (2) mistook the appraisers' calculations of just compensation as the measure of decline in property value; (3) erroneously applied *Tahoe-Sierra*, a moratorium case, to a condemnation; (4) ignored *Tahoe-Sierra*'s express distinction between the analysis applicable to condemnation of private property for government's own purposes, and regulatory action – such as the Lake Tahoe moratorium – taken to prevent environmental harm or adjust the "benefits and burdens of economic life"; and (5) in violation of *Armstrong v. U.S.*, ignored the fact that Santini is a single individual forced to sustain a substantial economic loss in order to allow the defendant agency, on behalf of the public, to freeze the Santini property while deciding whether to take title. On April 2, 2004, the Second Circuit denied the rehearing petition, App. at 42a. This Court extended the time for filing this petition to July 30, 2004.

REASONS FOR GRANTING THE WRIT

I.

WHETHER "PRECONDEMNATION ACTIVITY" SHOULD BE ANALYZED UNDER THE *PENN CENTRAL* TAKINGS FACTORS OR CONSTITUTES A CATEGORICAL EXCEPTION TO THE FIFTH AMENDMENT TAKINGS CLAUSE IS AN IMPORTANT QUESTION ON WHICH DECISIONS OF THIS COURT CONFLICT.

The Second Circuit held that as a matter of law, "precondemnation activity" is never a taking, citing *Agins* and *First English*. It reasoned that because *Agins* (1980) was decided after *Penn Central* (1978), it must be con-

sistent with its takings analysis. App. at 25a. The court noted the reference in *Tahoe-Sierra* to the *Agins* discussion of a proposed condemnation, *id.* at 27a.

If the Second Circuit's reading of *Agins* and *First English* is correct, there are at least two necessary consequences for takings law. First, when adjudicating a taking claim, a court's first inquiry is whether the government's activity is part of an incomplete condemnation process; if so, the court need not inquire into the three *Penn Central* factors. In other words, if the activity falls into the "pre-condemnation" category, it is exempt from takings liability *even if* it has resulted in a complete or substantial loss of economic use and has destroyed or substantially interfered with investment-backed expectations. Equally important, the decision compels a rule that government may avoid liability for a taking by repealing, rescinding, or abandoning a condemnation and thus rendering its efforts "pre"-condemnation.

It must be conceded that *Agins* states that a proposed condemnation was not a taking because the process was eventually abandoned. Similarly, *First English* contains the broad statement that "preliminary activity is not chargeable to the government." Also, the Second Circuit's interpretation of *Agins* is bolstered by the fact that *Tahoe-Sierra,* 535 U.S. at 335-37, during its discussion of why a moratorium (being temporary) cannot result in a total loss of economic use, cites the same *Agins* sentence about condemnation that is cited in the Second Circuit's opinion.

But if the Second Circuit's opinion directs a path for takings analysis, that path eventually runs headlong into a wall fortified by *Penn Central, First English,* and *Tahoe-Sierra. Penn Central* and *Tahoe-Sierra* clearly direct that, with the narrow exception of facts fitting

Lucas (a permanent taking and a total destruction of economic use), taking claims are not to be analyzed using categorical rules invoking one factor, but through a balancing of the three factors. *Tahoe-Sierra* rejected the petitioners' proposed categorical rule that all moratoria that deny economic use are takings *because* such a rule would forgo an inquiry into interference with expectations and the character of the governmental action, 535 U.S. at 320. And *First English* unmistakably holds that if government activity has already caused a taking, an agency may not thereafter avoid liability by rescinding its action.

Thus, the conflict and confusion: if *Agins* and *First English* hold that the initiation or early stages of condemnation – or perhaps any step short of the vesting of title in the condemnor – are exempt from takings liability, then what is to be made of the *Tahoe-Sierra* holding that any government action – whether preliminary, partial, or complete – must be analyzed using the three *Penn Central* factors? Moreover, how does one reconcile this categorical rule with the discussion in *Tahoe-Sierra* that the character of the governmental action factor weighs heavily toward the property owner when government uses condemnation powers to establish – or explore establishing – a public use? And if governments exercising condemnation powers are exempt from takings liability so long as they change course before completing the process – which could leave a property owner in limbo for years – what is the status of the *First English* principle that recission cannot avoid liability if a taking has already occurred?

Accompanying this conflict about a categorical exemption from takings liability is the issue of its scope: What is "precondemnation activity"? The Second Circuit's

decision neither defines the term nor cites any case that does. The petitioners have been unable to locate one. Does the term refer to the announcement of intent to condemn? To a period of physical testing (such as environmental) that often precedes a decision to acquire title? To an agency's announcement that it has made a "final" decision to proceed? To its procurement of funds for the condemnation?

The importance of this issue nationally should be evident. Condemnation of private property for public use is a core power of local, regional, state, and even the federal government, and is frequently employed. If there is a categorical exception to takings liability for steps occurring "prior" to condemnation, its existence and scope are vital information for both governments and property owners.

The answer to this confusion may be that the Second Circuit's decision is erroneous in citing *Agins* as stating a rule of decision that precondemnation activity is never a taking. In *Agins,* the subject property was undeveloped and no residential development plan had been filed with the City of Tiburon; thus, no permits had been granted and no rights had vested. The plaintiff's taking claim was a facial challenge to a rezoning ordinance. There is no reference in the decision to any evidence about the economic impact of the proposed condemnation or its purpose; the decision only states that the condemnation was undertaken "in good faith." *Agins,* 447 U.S. at 263 n.9. Thus, the *Agins* statement that the condemnation proceedings did not cause a taking may well have been the result of the plaintiff's lack of a constitutionally-pro-

tected property interest[10] and meager investment-backed expectations.

The Second Circuit's treatment of *First English* as holding that "preliminary activity" is always exempt from liability is even more suspect: in *Tahoe-Sierra*, this Court disavowed that *First English* was a holding with respect to governmental liability for a temporary taking, explaining that it decided only the availability of damages: "[In *First English*], we did not address . . . the quite different and logically prior question whether the temporary regulation at issue had in fact constituted a taking." *Tahoe-Sierra*, 535 U.S. at 328. Moreover, even if *First English* is regarded as a holding on this issue, that decision's reference to "preliminary government activity" does not describe preliminary steps taken by a condemnor, but government's deliberations about whether to issue permits to a private land owner for a proposed private use. Indeed, when *Tahoe-Sierra* referred to *First English* as addressing "ordinary *permit* delays," *id.* at 338 n.31 (emphasis added), it was not conceivably discussing exempting a condemnor from liability on the ground that the agency had yet to obtain permits for its intended public use.

Thus, in this case, a federal appeals court has interpreted two decisions of this Court in a manner that conflicts with other decisions of this Court. Review is warranted to resolve this confusion about a core issue of takings law.

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[10] By comparison, in this case, there is no question that Santini had a vested right under Connecticut law in his subdivision approval. It had been issued six years earlier, and he had spent $5 million in reliance on it, including the construction of roads, infrastructure, and houses.

II.

THE SECOND CIRCUIT'S INTERPRETATION OF THE THIRD FACTOR OF *PENN CENTRAL*, "CHARACTER OF THE GOVERNMENTAL ACTION," CONFLICTS WITH SEVERAL DECISIONS OF THIS COURT, PARTICULARLY *TAHOE-SIERRA*.

The Second Circuit's decision does not merely misapply properly-understood takings decisions of this Court to the facts of this case, but evinces fundamental misunderstandings regarding the *Penn Central* analysis, the nature of a temporary taking, and the difference between a regulatory taking claim and one arising from condemnation. The opinion conflicts with *Penn Central, First English, Tahoe-Sierra,* and *Armstrong.*

As discussed earlier, the Second Circuit, in the alternative, reviewed Santini's taking claim against the *Penn Central* factors. The Court's *Penn Central* analysis may be summarized in this manner: (1) there was no total loss of economic use because the condemnation was eventually repealed; (2) the economic impact was, at most, a modest fluctuation in value that was limited to the eleven months of formal condemnation; and (3) the government's actions were either categorically exempt as precondemnation activities, permissible regulatory restraint of private land use, or justified as a consequence of government's need to plan.

A review of *Tahoe-Sierra* will help illuminate the magnitude of the Second Circuit's departures from this Court's takings jurisprudence. At issue in *Tahoe-Sierra* was a 32 month moratorium imposed by a regional planning agency to regulate land use, and thus protect water quality, at Lake Tahoe. In 1981, the agency banned all new development on the most sensitive

nearby lands for two years until it could devise a comprehensive regulatory plan. It later extended the original moratorium, such that the suspension lasted a total of 32 months. A group of lot owners sued for a taking in federal court. The District Court held that during the 32 months that the owners had been deprived of all use, they had suffered a categorical taking under the *Lucas* case. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 34 F.Supp.2d 1226 (D. Nev. 1999). The Ninth Circuit reversed, holding that because the planning agency's action was by definition temporary, it could not have wiped out "all" economic use of the plaintiffs' properties, but at most suspended that use in order to facilitate an important government planning purpose, *see Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d 764 (9th Cir. 2000). During the appeals, the plaintiffs conceded that given the compelling environmental basis of the moratorium, they could not maintain a taking claim under the *Penn Central* balancing test. Thus, the case came before this Court as a facial challenge, a claim that the imposition of the 32 month moratorium on new construction on vacant lots had so completely deprived each property owner of economically viable use so as to create a categorical taking under *Lucas*.

In its April 2002 opinion, this Court rejected the petitioners' proposed categorical rule that any regulation that causes a temporary denial of all economic use constitutes a taking under *Lucas*. *Tahoe-Sierra*, 535 U.S. at 321. It declined this holding, in part, because such a rule would result in "no need to evaluate the landowners' investment-backed expectations, the actual impact of the regulation on any individual, the importance of the

public interest served by the impact of the regulation on any individual, the importance of the public interest served by the regulation, or the reasons for imposing the temporary restriction." *Id.* at 320. The court also observed that the facts of the case did not establish a total loss of value at any time because the moratorium, from the date of its imposition and by definition, was temporary and therefore only a suspension of use. *Id.* at 332.

As noted earlier, this Court reaffirmed the three *Penn Central* factors as the analysis that best weaves together the economic impact and governmental justification that should be considered in order to effectuate the purposes of the Takings Clause and to define liability for just compensation. *Id.* at 321. In the course of this endorsement of *Penn Central,* this Court reiterated two holdings from *First English* that protect government from the Takings Clause: (1) a regulation that temporarily denies all economic use is not a taking if imposed to protect public safety; and (2) delays in the development of land due to the length of the permitting process ("normal delays") are unlikely, absent bad faith, to warrant just compensation.[11] *Id.* at 329.

However, after explaining at length what actions do not constitute a taking, *Tahoe-Sierra* reaffirmed two realms in which government causes a taking and incurs liability for just compensation: First, this Court adverted

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[11] It should be observed that this Court's holding in *Williamson County,* 472 U.S. 172 (1985) (and its progeny), that a taking claim is not ripe for adjudication until the government entities with permitting jurisdiction have come to a final position on what uses they will and will not allow, essentially dispenses with most taking claims based on delays in obtaining permits. Regardless of the time frame for permitting, a taking claim will not exist until the agency makes clear its final position.

to the principle stated in *First English* that if, under the *Penn Central* factors, government has caused a taking, it may not avoid liability simply by rescinding, abandoning, or changing course and rendering the claim a "temporary" taking. "We merely hold that where the government's activities *have already worked a taking* of all use of property, no subsequent action by the government can relieve it of the duty of just compensation for the period during which the taking was effective. [*First English*, 482 U.S. at 3211 (emphasis added)." *Tahoe-Sierra*, 535 U.S. at 328. Thus, this Court differentiated governmental action – a moratorium – that is temporary *ab initio* from action that works a taking but is later repealed.

Equally important, *Tahoe-Sierra* discussed at length the difference between regulation and condemnation, between government's use of the police power to regulate private land use by adjusting the benefit and burdens of economic life, and the use of eminent domain for public purposes unrelated to the existing private use. *Tahoe-Sierra*, 535 U.S. at 320-26. This Court recognized that while the Fifth Amendment makes express reference to the taking of property "for public use," extending takings liability to governmental restraint of private land users and to delays in the issuance of permits requires inferences from the Fifth Amendment's purposes. *Id.* at 321. *Tahoe-Sierra*'s explanations on this point included (emphasis added):

- [The Fifth Amendment] requires the payment of compensation whenever the government acquires private property for a public use, *whether the acquisition is the result of a condemnation or a physical appropriation.* But the Constitution contains no comparable reference to regulations

that prohibit a property owner from making certain uses of her private property, *id.* at 321-22 [footnote omitted];

- This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private use, on the other, *makes it inappropriate* to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking' [footnote omitted], and vice versa, *id.* at 323;
- [*Tahoe-Sierra*] does not present the 'classic taking' in which the government directly appropriates private property for its own use, *Eastern Enterprises v. Apfel,* 524 U.S. 498, 522 (1998); instead the interference with property rights 'arises from some public program adjusting the benefits and burdens of economic life to promote the public good,' *Penn Central,* 438 U.S. at 124, *Tahoe-Sierra,* 535 U.S. at 324-25.

Thus, *Tahoe-Sierra* repeatedly and clearly separates condemnation for public use from restraint through regulation, distinguishes "appropriation" from a physical invasion, and holds that regulatory taking principles differ from those applicable to condemnation cases.

None of these distinctions appear in the Second Circuit's opinion in this case. Combining this review of *Tahoe-Sierra* with earlier recitations of *Penn Central* and *First English* allows a distillation of the ways in which the Second Circuit's opinion conflicts with or misapprehends decisions of this Court. The appellate decision:

- violates the *Penn Central* three-factor balancing analysis by regarding the "character of the action"

as dispositive and by disregarding economic impact and interference with investment-backed expectations;

- erroneously applies *Tahoe-Sierra*'s finding that a moratorium, being temporary, cannot destroy all economic use, to a condemnation action that, when initiated, was legislatively-mandated and of unknown duration;[12]
- ignores *Tahoe-Sierra*'s direction that condemnation and regulation are different, that condemnation is akin to a physical taking, and that the principles of regulatory takings cases are not to be applied to appropriation of private property through condemnation;
- violates *Penn Central,* its predecessors (such as *Pennsylvania Coal Company v. Mahon,* 260 U.S. 393 (1922)) and progeny (such as *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470 (1987), *Lucas, Palazzolo,* and *Tahoe-Sierra*), by focusing on the duration and completeness of the condemnor's actions instead of the economic duration and magnitude of the impact of those actions on the subject property and the owner's expectations;
- erroneously regards *Tahoe-Sierra*'s upholding of a 32 month moratorium as a basis for holding

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[12] And in making a factual finding that the property retained value during the condemnation and after its revocation, the court violated the evidentiary rule that where witnesses testify as experts on a matter beyond the purview of non-experts *and concur,* the trier of fact may reject their testimony but not make a finding of fact that contradicts their conclusion, *see, e.g., Bose Corp. v. Consumers Union,* 466 U.S. 485, 512 (1984); *Moore v. Chesapeake & Ohio Ry.,* 340 U.S. 573, 576 (1951); *In re Wolverton Assoc.,* 909 F.2d 1286, 1296 (9th Cir. 1990); *Martin v. Citibank, N.A.,* 762 F.2d 212, 217 (2d Cir. 1985); *Hurd v. American Hoist & Derrick Co.,* 734 F.2d 495, 500 (10th Cir. 1984).

that government action that lasted eleven months is *de minimis* under *Penn Central*;

- violates *Penn Central* and *Tahoe-Sierra* by considering, under the third balancing factor, protection of a condemnor from takings liability, even though *Tahoe-Sierra* directs that in cases involving condemnation for public use, the third factor weighs heavily toward the property owner; and
- ignored *Armstrong*, the vitality of which was reaffirmed in *Tahoe-Sierra*, by ignoring the near-perfect fit of the facts of this case to the purpose of the Takings Clause articulated in that case.

If *Penn Central*, as explained most recently by *Tahoe-Sierra*, means anything, it is that taking claims are to be evaluated along a continuum. The weakest claims are those involving a modest impact on economic use and expectations, weighed against a compelling governmental need to protect public health or safety. The strongest claims are those premised on a total or near total loss of economic use; revocation of vested rights in lawfully-issued permits; interference with an owner's substantial, good-faith expenditures in reliance on permits; and government action that uses condemnation to supplant private use with an unrelated public use. The most difficult cases, of course, are those in the middle. But none of these cases can be accurately placed along the Takings Clause's continuum if courts are directed, authorized, or encouraged to accord dispositive significance to one factor or to utilize categorical rules to ignore one or more factors. The Second Circuit's opinion in this case upends the very points that this Court made in *Tahoe-Sierra*: the

necessity of evaluating multiple factors in the adjudication of taking claims and the distortions of purpose and fairness that result from categorical analysis. The conflicts between the decision in this case and this Court's taking jurisprudence involve the most basic and important guidance in takings law, and warrant resolution.

III.

THIS CASE WILL ALLOW THE COURT TO CLARIFY THE *PENN CENTRAL* FACTORS WITHOUT COLLATERAL PROCEDURAL ISSUES OR WEIGHING PROPERTY RIGHTS AGAINST ENVIRONMENTAL CONCERNS.

This case comes before this Court with several attributes that distinguish it from most of the Fifth Amendment takings cases decided by this Court in the past 25 years: The real property development at issue in this case does not involve degradation of environmental resources or potential harm to the environment. The facts relevant to the taking issue occurred some six years after local and state government agencies had granted to Santini all permits necessary for his development. For this reason, this case does not involve a *Williamson County* "finality" issue. In addition, this case does not involve the whole parcel analysis, a regional plan, or an exaction. Nor does this case involve the application of land use or environmental regulations to a proposed use of the property, regulations which might be said to adjust the benefits and burdens of property ownership with respect to allowable uses and thereby provide the property owner a benefit as well as a burden.

This is plainly a case in which a single property owner, in the midst of a fully-permitted, lawful, and benign use of his land, was forced by an agency's exercise of delegated eminent domain power to accept the economic

idling of his $2 million property and his $5 million equity investment so that Connecticut could study the suitability of his land for public use for the benefit of Connecticut's largest industrial corporations, hospitals, utilities, and universities. This case comes to the Court with undisputed facts and a stipulated record, the most important of which is the concurring testimony of the appraisers. Thus, as to the issue of economic impact, there is a binding record. The concurrence of the expert real estate appraisers is extraordinary in that they agreed on the value of the property prior to the June 1991 designation as well as the precise length of time that Santini was disabled from generating any revenue. As noted earlier, *see* n.12, this concurrence of the expert witnesses prevents a trier of fact from reaching a contrary finding (as the Second Circuit did). Thus, there is no dispute as to the facts underlying the first and second *Penn Central* factors.

CONCLUSION

For the foregoing reasons, the petitioners respectfully submit that this Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit should be granted.

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July 27, 2004

APPENDIX A

[Filed Aug 28 2003]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2002

(Argued: June 16, 2003 – Decided: August 28, 2003)

Docket No. 02-9150

EVANDRO S. SANTINI and SANTINI HOMES, INC.,
Plaintiffs-Appellants,

v.

CONNECTICUT HAZARDOUS WASTE MANAGEMENT SERVICE,
Defendant-Appellee.

Before:

NEWMAN, WINTER and B.D. PARKER, JR.,
Circuit Judges.

Evandro S. Santini and Santini Homes, Inc. appeal from a judgment of the United States District Court for the District of Connecticut (Warren W. Eginton, *Judge*) dismissing their Fifth Amendment takings claim. Affirmed.

TIMOTHY S. HOLLISTER (Patrick M. Fahey, on the brief), Shipman & Goodwin LLP, Hartford, CT, *for Plaintiffs-Appellants.*

ROBERT D. SNOOK, Assistant Attorney General, for Richard Blumenthal, Attorney General of the State of Connecticut, Hartford, CT, *for Defendant-Appellee.*

MARK A. CHERTOK, Sive, Paget & Risel, P.C., New York, NY (Duane Desiderio and Mary Lynn Pickel, National Association of Home Builders, Washington, D.C., Michael M. Berger, Berger & Norton, Los Angeles, CA, and William H. Ethier, HBA of Connecticut, Inc., West Hartford, CT, of counsel), filed a brief for *Amici Curiae* National Association of Home Builders and Home Builders Association of Connecticut, Inc. in support of plaintiffs-appellants.

B.D. PARKER, JR., *Circuit Judge.*

In this appeal, Evandro S. Santini and his real estate development firm, Santini Homes, Inc., challenge a judgment of the United States District Court for the District of Columbia (Warren W. Eginton, *Judge*) in favor of the Connecticut Hazardous Waste Management Service (the "Service"). After unsuccessfully pursuing a state-law takings claim in the Connecticut courts, Santini sued in federal court, alleging that the Service's announcement that his property was one of three sites under consideration for the location of a low-level radioactive waste disposal facility constituted a taking without just com-

pensation in violation of the Fifth Amendment.[1] The Distirct Court dismissed Santini's complaint on three grounds: the *Rooker-Feldman* doctrine,[2] collateral estoppel, and the merits of the takings claim.

Because Santini did not raise, and could not have raised, his federal takings claim in the state court action, we conclude that the *Rooker-Feldman* doctrine and res judicata do not apply. Moreover, we recognize an exception to the applicability of collateral estoppel for plaintiffs who litigate state-law takings claims in state court solely to comply with the ripeness requirement of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), as Santini did. We hold that litigants who pursue inverse comdemnation actions in state court in order to comply with *Williamson County* may reserve their federal takings claims for later resolution in federal courts. Because we announce this reservation rule for the first time, we apply the requirement prospectively only and deem Santini to have reserved his federal claim, rendering collateral estoppel inapplicable. But because we believe that the Service is entitled to summary judgment on the merits of Santini's takings claim, we affirm the judgment of the District Court.

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[1] The Fifth Amendment provides, in part, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The takings clause of the Fifth Amendment is made applicable to the states through the Fourteenth Amendment. *See, e.g., Dolan v. City of Tigard*, 512 U.S. 374, 383-84 & n.4 (1994).

[2] *See Rooker v. Fidelity Trust Co.*, 263 U.S. 412 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983) (holding that inferior federal courts have no jurisdiction over cases that effectively seek review of state court judgments).

BACKGROUND

The material facts are undisputed. Santini develops residential real estate in the area surrounding Hartford, Connecticut. In 1985, he purchased, for $147,500, a 20.3-acre parcel of land in Ellington, Connecticut. Santini obtained approval from the Ellington Planning and Zoning Commission to subdivide the parcel, to be known as Ellridge Estates, into sixteen lots. Beginning in 1985, Santini built an access road to the development, installed storm drainage and sewer systems, and, in all, spent approximately $500,000 developing infrastructure.

In 1988, Santini purchased, for $1,075,000, a 54.6-acre parcel (the "Pinney Street property") adjacent to the Ellridge Estates parcel, intending to develop the two parcels into a unified 75-acre residential village consisting of approximately 100 homes. Santini began building model homes in 1987, constructing houses on four lots of the Ellridge Estates parcel. He also made other investments in the properties, including completing engineering studies and preliminary layouts for the Pinney Street property and borrowing funds for the construction of its infrastructure. Because of a recession in the real estate market, construction proceeded slowly until 1991. When market conditions improved, Santini renewed his efforts to sell homes in Ellridge Estates: he lowered prices, established a mortgage program customized to the development, and began advertising aggressively. By June 1991, he had identified likely buyers for two of the homes, spent $5 million in acquiring and developing the Ellington properties, and borrowed $4.7 million that was earmarked for further construction on the Pinney Street property.

The Service is a quasi-public governmental agency established pursuant to Connecticut General Statutes §22a-163 *et seq.* and charged with siting a low-level radioactive waste disposal facility. The Low-Level Radioactive Waste Policy Act of 1980, 42 U.S.C. §2021b *et seq.*, required the states to make adequate provision for the disposal of low-level radioactive waste generated within their borders by entering into regional compacts, and it imposed financial penalties on those states that failed to do so. In 1986, with few states complying with the Act, Congress passed the Low-Level Radioactive Waste Policy Amendments Act, 42 U.S.C. §2021b *et seq.*, which required the states by the end of 1992 to dispose of their domestically generated radioactive waste either in-state or through compacts with other states. In order to comply with the federal requirements, Connecticut entered into a regional compact and enacted legislation directing the Service to locate a disposal facility within the state. *See* Conn. Gen. Stat. §22a-163c (1995).

The Service developed a plan which first required it to locate sites that were likely to be suitable. Of these, the Service would then identify those sites that would actually be suitable. The list of potential sites would be winnowed to eight, with the Service's Board of Directors selecting three of the eight as finalists. Once three finalists were identified, on-site examiantions would be conducted and one site would be selected as the preferred site. The preferred site would then be monitored for at least twelve months, in accordance with federal Nuclear Regulatory Commission ("NRC") regulations. *See Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 251 Conn. 121, 125-26 & n.6 (1999). The Service never got beyond the identification of three finalist sites.

On June 10, 1991, after secret deliberation, the Service announced that it had identified three sites. (The Service later identified five other back-up sites). Two were located in Ellington, and the third was located in a neighboring town. One of the Ellington sites included the undeveloped portion of Santini's Ellridge Estates and the entirety of his Pinney Street property. Santini did not know, prior to the Service's June 10 announcement, that his property was under consideration. On June 30, 1991, the three potential sites, including Santini's property, were depicted in the Hartford Courant below the international symbol for radioactivity and the headline, "Nuclear waste: Where should it go?" *The Hartford Courant*, June 30, 1991 at H5. In late 1991, the Service eliminated one of the three sites from consideration, leaving Santini's property as one of two finalists.

After vocal public opposition in and around Ellington to the Service's siting plan, the Connecticut legislature passed, and the Governor signed into law, Public Act 92-45, which directed the Service to develop a new plan for locating a disposal facility. Public Act 92-45, which took effect May 5, 1992, effectively overruled the Service's June 10, 1991 siting announcement. Ultimately, neither Santini's property nor any other Connecticut site was selected as the preferred site, a necessary prerequisite to the state's exercise of its eminent domain power to take private property such as Santini's for the construction of a disposal facility.[3]

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[3] Even if Santini's property had been designated the preferred site, it still would have had to clear a number of regulatory hurdles before becoming the location of the waste disposal facility. For example, permits from the NRC, the Connecticut Department of Environmental Protection, and the Connecticut siting council, as well as eminent domain proceedings, *see* Conn. Gen. Stat. § 22a-163w(b)(c) (1995), would have been required.

Notwithstanding the enactment of Public Act 92-45, however, Santini's property remained economically idle until mid-1993, and he continued to incur additional carrying costs, including interest on debt and property taxes, until 1994. In 1994 Santini sued the Service in Connecticut Superior Court, alleging that its June 10, 1991 siting announcement – naming his property one of three finalists – constituted a temporary taking of his property without just compensation in violation of Article I, §11 of the Connecticut Constitution. Santini's complaint alleged that the Service's siting announcement had: (1) prevented him from selling the homes and lots in Ellridge Estates; (2) prevented him from completing development of Ellridge Estates and the Pinney Street property; (3) denied him any economic return on his investments in the two parcels; (4) caused him to incur additional costs and incidental damages; and (5) left him with no alternative use of his property. Santini brought only a state-law takings claim because he believed that, under the Supreme Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), a federal takings claim would not be ripe until he had sought, and been denied, just compensation in a state-law inverse condemnation action.[4]

The Superior Court held an eight-day bench trial in early 1998. In addition to fact witnesses, Santini and the

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[4] "Inverse condemnation should be distinguished from eminent domain. Eminent domain refers to a legal proceeding in which a government asserts its authority to condemn property. Inverse condemnation is a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." *Agins v. City of Tiburon*, 447 U.S. 255, 258 n.2 (1980) (citations and internal quotation marks omitted).

Service both presented expert appraisal testimony concerning the economic impact of the siting announcement on Santini's property. Santini's appraiser, Edward Heberger, testified that Santini's damages as a result of the June 10, 1991 siting announcement were $890,000 for the Ellridge Estates property and $65,000 for the Pinney Street property, for a total loss of $955,000. Heberger's appraisal was based on his conclusion that the siting announcement had paralyzed Santini's construction and sales efforts for two years, a period including the eleven months that the siting desigiation was in effect as well as a thirteen-month "stigma period" that followed. The Service's appraiser, William N. Kinnard, Jr., testified that the siting announcement had diminished the value of the Ellridge Estates properby by $185,-000 and the Pinney property by $30,000, for a total loss of $215,000.

Following trial, the Superior Court found that, although Santini had suffered an economic loss as a result of the siting announcement, the announcement "was part of the state's planning process," and "[s] uch planning is not actionable." *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, No. CV 94 0538646S, 1998 WL 422166, at *5 (Conn. Super. July 13, 1998). The Superior Court found no evidence that the state's intent to condemn Santini's property had ever become "fixed and irreversible," *id.* at *6 (citation and quotation marks omitted), and concluded that "there was no unconstitutional taking of any kind," *id.* at *7. Accordingly, the Superior Court entered judgment for the Service. *id.*

Santini appealed to the Appellate Court of Connecticut, but before that court could act the Supreme Court of Connecticut transferred the case to itself. *Santini*, 251 Conn. at 123 n.1. The Supreme Court affirmed the

judgment of the Superior Court by a vote of five to two. *Id.* at 144, 151. Echoing the Superior Court, the Supreme Court held that the Service's siting announcement constituted "mere governmental planning and preliminary steps in anticipation of condemnation," not "a fixed and irreversible decision by the state to exercise its power of eminent domain regarding [Santini's property]." *Id.* at 140; *see also id.* at 144. The Supreme Court of the United States denied Santini's petition for certiorari. *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 530 U.S. 1225 (2000).

Following his loss in state court, Santini sued the Service in the District Court, alleging a takings claim under the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983. The Service moved to dismiss the complaint and for summary judgment, and Santini also moved for summary judgment. The District Court dismissed the complaint for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine, concluding that Santini's federal takings claim was inextricably intertwined with the judgment of the Connecticut Supreme Court dismissing his state-law takings claim. The court also noted that, even if *Rooker-Feldman* did not apply, it would grant the Service's motion for summary judgment on the basis of collateral estoppel and on the merits of Santini's takings claim. The court concluded that collateral estoppel barred Santini's federal takings claim because "the issue necessary to the Connecticut Supreme Court's decision – the extent or finality of the defendant's action – is identical to [the] consideration required for the instant federal takings claim." (Ruling on Mot. to Dismiss and Cross-Motions for Summ. J., Aug. 27, 2002, at 13.) The District Court also noted that the Service was entitled to

summary judgment because it had not made a final decision as required by *Williamson County* and because the selection of Santini's property as one of three finalists "*left open the possibility that [Santini's] property would* not ultimately be selected as the radioactive disposal site." (*Id.* at 15.) This appeal followed.

DISCUSSION

The Service defends the judgment of the District Court on three grounds. It argues that: (1) Santini's takings claim is not ripe because the Service did not make a final decision with respect to his property; (2) the District Court properly consluded that it lacked jurisdiction under *Rooker-Feldman*; and (3) Santini's takings claim is barred by res judicata and collateral estoppel. We review *de novo* the decision of the District Court, which granted the Service's motions to dismiss and for summary judgment and denied Santini's motion for summary judgment. *See, e.g., Manning v. Utils. Mut. Ins. Co.*, 254 F.3d 387, 391 (2d Cir. 2001).

I. Ripeness

In *Williamson County*, the Supreme Court established a two-pronged test for determining whether a Fifth Amendment takings claim is ripe. "The first prong requies the government entity charged with enforcing the regulations at issue to have rendered a 'final decision,' " and "[t]he second prong requires the plaintiff to have sought compensation if the state provides a "reasonable, certain and adequate provision for obtaining compensation.' " *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 95 (2d Cir. 1992) (quoting *Williamson County*, 473 U.S. at 186, 194). Since the Service

concedes that Santini's pursuit of a state-law takings claim in the Connecticut courts satisfies the second prong, the dispute over ripeness focuses on the first prong: whether the Service rendered a final decision with respect to Santini's property.

Under the first *Williamson County* prong, a takings claim is not ripe until the appropriate government entity has reached a final decision regarding the property at issue. *Williamson County*, 473 U.S. at 186. The Service argues that Santini's takings claim is unripe because it never made the "final decision" to acquire Santini's property and to locate a disposal factility there, and because "[t]he only action by the government was a public announcement that certain sites were to be considered for possible future acquisiton." (Br. of Def.-Appellee at 15.) Implicit in the finality requirement of *Williamson County* is the notion that a takings claim is unripe if, before seeking just compensation through an inverse condemnation claim, the plaintiff could have taken some action to prevent the challenged governmental regulation from depriving him of an economically viable use of his property. In *Williamson County* itself, for example, a jury had found that the respondent, Hamilton Bank of Johnson City, would be denied the economically feasible use of its property if it were forced to develop the property in conformity with each of eight objections raised by the petitioner, the Williamson County Regional Planning Commission. *Id.* at 191. Finding the Bank's inverse condemnation claim unripe, the Supreme Court noted that "[i]t is not clear whether the jury would have found that the respondent had been denied all reasonable beneficial use of the property had any of the eight objections been met through the grant of a variance." *Id.*; *see also Palazzolo v. Rhode Island,*

533 U.S. 606, 620 (2001) (holding that regulatory takings claim was unripe until property owner had "followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property"). Significantly, the Service does not suggest any action that Santini could have taken to "ripen" his takings claim, and we are aware of none. *See, e.g., Hall v. City of Santa Barbara,* 833 F.2d 1270, 1281-82 n.28 (9th Cir. 1986) ("It is not clear what the city would have the Halls do to perfect their claim. . . . The Halls have no further administrative recourse available. . . .").

In any event, the Service misconstrues the ripeness inquiry in two ways. First, it erroneously assumes that, under *Williamson County*, the particular governmental decision of which a takings plaintiff complains – here, the siting announcement – must itself constitute a final decision. That is not the case. Rather, the first prong of *Williamson County* requires only that the government entity *have rendered* a final decision. *See Williamson County*, 473 U.S. at 186. Once it does so, a takings claim based on an earlier step of the regulatory process is ripe (though not necessarily meritorious). Second, the Service erroneously assumes that a takings claim is not ripe unless the government entity's final decision is adverse to the plaintiff. This assumption no doubt explains the Service's misplaced reliance on the true-but-irrelevant fact that the State of Connecticut never made the final decision to acquire Santini's property. For ripeness purposes, it does not matter that the Service's ultimate decision – not to acquire Santini's property – was favorable to Santini. Rather, all that matters is that the Service made a final decision. Thus, regardless

of whether the siting announcement was itself a final decision,[5] and despite the fact that the Service never made the final decision to acquire Santini's property, the Service did make the final decision not to acquire Santini's property. That is all that *Williamson County* requires.

III. *Rooker-Feldman*, Res Judicata, and Collateral Estoppel

The Service argues that, as a result of the Connecticut Supreme Court's judgment in its favor on Santini's state-law takings claim, the *Rooker-Feldman* doctrine deprives the District Court and this Court of subject matter jurisdiction over Santini's Fifth Amendment takings claim and, in the event that *Rooker-Feldman* does not apply, res judicata and collateral estoppel bar Santini from litigating his takings claim in the federal courts. Santini counters that, even if *Rooker-Feldman*, res judicata, and collateral estoppel would otherwise apply, the unique procedural posture of post-*Williamson County* takings claims requires us to carve out exceptions to the preclusion doctrines. Before deciding whether to create the exceptions that Santini requests, however, we must determine whether any of the three preclusion doctrines applies.

The essence of the *Rooker-Feldman* doctrine "is that inferior federal courts have no subject matter jurisdiction

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[5] We take no position on whether Santini's claim would have been ripe before the state decided not to acquire his property. That is, the siting announcement itself might have constituted a final decision under *Williamson County*, as Santini argues, but we need not decide that here, because the state's ultimate decision not to acquire Santini's property was undeniable final.

over cases that effectively seek review of judgments of state courts and that federal review, if any, can occur only by way of a certiorari petition to the Supreme Court." *Moccio v. N.Y. State Office of Court Admin.*, 95 F.3d 195, 197 (2d Cir. 1996). *Rooker-Feldman* bars those claims that were adjudicated in a prior state court action, as well as those claims that are "inextricably intertwined" with the state court judgment. *Id.* at 198-99. We have held that " 'inextricably intertwined' means, at a minimum, that where a federal plaintiff had an opportunity to litigate a claim in a state proceeding . . ., subsequent litigation of the claim will be barred under the *Rooker-Feldman* doctrine if it would be barred under the principles of preclusion." *Id.* at 199-200.

Santini's Fifth Amendment takings claim was not litigated in the Connecticut state courts, where Santini asserted only a state-law takings claim. In order for *Rooker-Feldman* and res judicata to apply, then, Santini must have had the opportunity to litigate his federal takings claim in the state court action. Both federal and Connecticut law make clear that Santini did not have this opportunity. First, according to Santini, the only reason he brought a state-law takings claim before pursuing a federal claim is because he believed that *Williamson County* required him to do so. The Supreme Court held in *Williamson County* that, "because the Fifth Amendment proscribes takings *without just compensation*," a takings claim is not ripe until the property owner has sought compensation through the procedures that the state provides. *Williamson County*, 473 U.S. at 194 n.13. The Court indicated that, if state law permits a property owner to bring an inverse condemnation action to obtain just compensation for an alleged taking, then the property owner must pursue such an action

before bringing a Fifth Amendment takings claim under §1983. *Id.* at 196-97.

Applying *Williamson County*, we held in *Southview Associates*, 980 F.2d at 99-100, that the plaintiff's regulatory takings claim was not ripe because the plaintiff had not pursued an inverse condemnation action under Vermont law in state court. Like the plaintiffs in *Williamson County* and *Southview Associates*, Santini could not have brought a Fifth Amendment takings claim in federal court until *after* he brought a state law inverse condemnation action in state court. Moreover, under Connecticut law Santini could not have litigated his Fifth Amendment takings claim in the state court action. In *Melillo v. City of New Haven*, 249 Conn. 138, 154 n.28 (1999), the Connecticut Supreme Court held that the plaintiffs were not entitled to consideration of their federal takings claim in state court "because of the existence of a legally sufficient procedure, under article first, §11, of the constitution of Connecticut, to obtain just compensation for the alleged taking of their property." Thus, because Santini neither brought, nor could have brought, a Fifth Amendment takings claim in the Connecticut state court action, *Rooker-Feldman* and res judicata do not apply. *See Moccio*, 95 F.3d at 199-200; *Isaac v. Truck Serv., Inc.*, 253 Conn. 416, 420-21 (2000).

Whether to apply collateral estoppel is a more difficult question. Collateral estoppel differs from *Rooker-Feldman* and res judicata in at least one significant respect. Collateral estoppel may preclude the relitigation of an issue that was actually litigated in a previous action, even if the claim in which the issue arises in the subsequent action was not brought and could not have been brought in the previous action whose judgment gives rise to the estoppel. *See, e.g., Gladysz v. Planning & Zoning*

Comm'n. of Town of Plainville, 256 Conn. 249, 260 (2001); *see also* Restatement (Second) of Judgments §27 (1982) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, *whether on the same or a different claim*." (emphasis added)).

Ordinarily, collateral estoppel would apply if (1) an issue that is an essential element of Santini's Fifth Amendment takings claim was actually litigated in the state court action; and (2) the Connecticut Supreme Court "made a determination that was necessary to its judgment with respect to that issue." *R & R Pool & Patio, Inc. v. Zoning Bd. of Appeals of Town of Ridgefield*, 257 Conn. 456, 467 (2001). The Connecticut Supreme Court rejected Santini's state-law takings claim because it concluded that the June 10 siting announcement constituted mere governmental planning, not an actionable taking. It is undisputed that this issue was actually litigated in the state courts and was necessary to the Supreme Court's decision. In addition, for the reasons discussed in Section IV, *infra*, the mere-governmental-planning issue is essential to Santini's Fifth Amendment takings claim as well. Nevertheless, we decline to apply collateral estoppel here for an independent reason.

The requirement of *Williamson County* that a property owner must pursue compensation through available state procedures, such as a state-law inverse condemnation action, before bringing a Fifth Amendment takings claim has created a Catch-22 for takings plaintiffs. Under *Williamson County*, a plaintiff may not bring a Fifth Amendment takings claim without first having

unsuccessfully pursued a state-law takings claim. Under traditional notions of collateral estoppel, however, the state court's adverse judgment will often preclude the plaintiff's subsequent Fifth Amendment takings claim. *See, e.g., Dodd v. Hood River County*, 59 F.3d 852, 863 (9th Cir. 1995) (stating that collateral estoppel bars federal takings claim if state court's earlier decision on state-law takings claim was "an equivalent determination under the federal taking clause"). Though application of the preclusion doctrines deprives a large class of plaintiffs of the opportunity to pursue Fifth Amendment takings claims in federal court – or, in many cases, anywhere – most of the circuits to have addressed this issue have declined to create an exception to render res judicata and collateral estoppel inapplicable in this situation. *See, e.g. Wilkinson v. Pitkin County Bd. of County Comm'rs*, 142 F.3d 1319, 1324 (10th Cir. 1998) ("We conclude the *Williamson* ripeness requirement is insufficient to preclude application of res judicata and collateral estoppel principles in this case."); *Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362, 364-65 (9th Cir. 1993) (holding that res judicata bars federal takings claim); *Peduto v. City of N. Wildwood*, 878 F.2d 725, 729 (3d Cir. 1989) (same); *see also Barefoot v. City of Wilmington*, 306 F.3d 113, 121 (4th Cir. 2002) (holding that *Rooker-Feldman* doctrine deprived district court of jurisdiction over federal takings claim); *but see Anderson v. Charter Township of Ypsilanti*, 266 F.3d 487, 497 (6th Cir. 2001) (holding that *Rooker-Feldman* doctrine bars federal takings claim brought by plaintiff who had initially brought both state and federal takings claims in state court and, after removal and remand, failed to reserve federal claim in state court); *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1305-06 (11th Cir. 1992) (recognizing a

limited exception to the applicability of res judicata and collateral estoppel to federal takings claims).

Although we are not prepared to declare res judicata and collateral estoppel wholly inapplicable to takings claims, we part ways with most of our sister circuits in favor of a middle ground. In *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411 (1964), the Supreme Court recognized a procedure whereby parties who are involuntarily litigating state-law claims in state court may "reserve" their federal claims for a later determination by a federal court. The plaintiffs in *England* filed a complaint in federal court raising claims under both federal and state law, and the district court abstained pursuant to *Railroad Commission v. Pullman Co.,* 312 U.S. 496 (1941), in order to permit the Louisiana state courts to resolve issues of state law. *England,* 375 U.S. at 412-13; *Temple of Lost Sheep Inc. v. Abrams,* 930 F.2d 178, 182 (2d Cir. 1991). The plaintiffs then brought an action in state court, raising the federal and state claims. *England,* 375 U.S. at 413. After losing in state court, plaintiffs returned to federal court, where they sought to pursue their federal claims anew. *Id.* at 413-14. The district court dismissed the claims as precluded by the state court judgment, and the plaintiffs appealed directly to the Supreme Court. *Id.* at 414-15.

Concerned that litigatns would otherwise be deprived of the opportunity to litigate their federal claims in federal court, the *England* Court created a mechanism whereby state-court litigants could reserve their federal claims and deprive the state court's judgment of preclusive effect in federal court. The Court stated, "There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims

can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims." *Id.* at 415. The Court held that "if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then . . . he has elected to forgo his right to return to the District Court." *Id.* at 419. The Court also held that "a party may readily forestall any conclusion that he has elected not to return to the District Court" by "inform[ing] the state courts that he is exposing his federal claims there only for [a limited] purpose. . . , and that he intends, should the state courts hold against him on the questin of state law, to return to the District Court for disposition of his federal contentions." *Id.* at 421. Although the plaintiffs in *England* had not reserved their federal claims in state court, the Supreme Court declined to apply the case's holding to them, as they had incorrectly, but reasonably, believed that an earlier Supreme Court decision required them to raise their federal claims in state court. *Id.* at 422-23.

Admittedly, the procedural posture of this case differs somewhat from that of *England,* as Santini filed a complaint in state court first and, therefore, there was no occasion for a federal court to abstain. This distinction, however, is not a meaningful one. Although Santini initiated his action in state court, he was not in state court voluntarily. *See Fields,* 953 F.2d at 1306 (holding that "would-be federal court litigants who are forced to pursue state court proceedings in order to satisfy exhaustion requirements imposed by federal law incident to a takings clause claim are 'involuntarily' in the state courts, and therefore qualify for the exception to generally applicable res judicata principles"). More-

over Santini did not, and could not, present his federal claim to the state court. The Supreme Court has made clear that these facts carry substantial weight in determining whether a §1983 claim is barred by res judicata or collateral estoppel on the basis of a prior state court judgment. In *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984), the Court held that state-court judgments have the same preclusive effect in federal-court §1983 actions as they would have in state court. The Court noted, however, that the "petitioner d[id] not claim that the state court would not have adjudicated her federal claims had she presented them in her original suit in state court. Alternatively, petitioner could have obtained a federal forum for her federal claim by litigating it first in a federal court." *Id.* at 84-85. Here, in contrast, the Connecticut state courts would not have adjudicated Santini's federal takings claim if he had presented it to them, *see Melillo*, 249 Conn. at 154 n.28, and Santini could not have litigated his federal takings claim in federal court before proceeding to state court, as it would have been dismissed as unripe, *see Southview Assocs.*, 980 F.2d at 100.[6]

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[6]In support of Santini, the *amici* urge us to hold that the second prong of *Williamson County* requires only that plaintiffs pursue just compensation through state administrative proceedings, not through state-court inverse condemnation actions. For two independent reasons, however, this argument does not avail Santini. First, we are bound by *Williamson County* and *Southview Associates*, both of which require takings plaintiffs to pursue state-law inverse condemnation actions before bringing federal takings claims. We decline *amici*'s invitation to find that the Supreme Court overruled *Williamson County sub silentio* in *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997). If the Supreme Court had intended to overrule the ripeness require-

[footnote continued]

While we have not previously held that parties may use the *England* reservation procedure in cases that did not properly originate in federal court, we deem it appropriate to permit parties like Santini, who litigate state-law takings claims in state court involuntarily, to reserve their federal takings claims for determination by a federal court. It would be both ironic and unfair if the very procedure that the Supreme Court required Santini to follow before bringing a Fifth Amendment takings claim – a state-court inverse condemnation action – also precluded Santini from ever bringing a Fifth Amendment takings claim. We do not believe that the Supreme Court intended in *Williamson County* to deprive all property owners in states whose takings jurisprudence generally follows federal law (*i.e.*, those to whom collateral estoppel would apply) of the opportunity to bring Fifth Amendment takings claims in federal court. Thus, in permitting state-court litigants to reserve their federal takings claims for determination in subsequent federal-court actions, we decline to interpret *Williamson County* in such a way as to deprive a large class of prospective

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ment of *Williamson County*, it would have said so explicitly. *See Hohn v. United States*, 524 U.S. 236, 252-53 (1998) ("This is not to say opinions passing on jurisdictional issues *sub silentio* may be said to have overruled an opinion addressing the issue directly. Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." (internal citation omitted)). Second, precedent aside, because Santini has already brought an inverse condemnation action in state court, our holding that such an action is not required would not benefit him. To the contrary, if Santini's state-court litigation were not required, then his presence in state court would have been voluntary, and his federal claim would be barred by collateral estoppel.

plaintiffs of federal forums for their federal takings claims.[7]

Future takings plaintiffs will still have to comply with the *Williamson County* requirement that they pursue available inverse condemnation actions under state law before bringing federal takings claims. In doing so, however, such parties may explicitly reserve their federal takings claims, making clear to the state court and adverse parties that they intend to bring a federal takings claim in federal court once the litigation of the state-law claim has been completed. This "*Santini* reservation" will mean that the state court's judgment on the state-law claim would not have preclusive effect in the subsequent federal action. Although Santini did not make such a reservation in Connecticut state court, we apply the reservation requirement prospectively only, and we deem Santini, who neither litigated his federal claim in state court nor sought to do so, to have reserved his federal claim. *See England,* 375 U.S. at 422-23 (applying new rule prospectively); *Bd. of Regents of Univ. of State of N.Y. v. Tomanio,* 446 U.S. 478, 498 (1980) (Brennan, J., dissenting) (advocating "wholly prospective" application of reservation rule). Thus, because the judgment of the Connecticut Supreme Court on Santini's state-law claim has no preclusive effect here, we turn to the merits of the takings claim.

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[7] We recognize that, unlike Connecticut, other states may permit property owners to bring state and federal takings claims simultaneously. Plaintiffs who pursue inverse condemnation actions in those states in order to comply with *Williamson County* also may reserve their federal claims for subsequent federal court adjudication. This result is consistent with *England,* in which the plaintiffs were permitted to raise their federal claims anew in federal court even though they had already litigated them in state court.

IV. Summary Judgment

The fact that Santini's takings claim is based on nothing more than the Service's 1991 siting announcement – perhaps the prototypical precondemnation governmental activity – dooms the claim on its merits, as the Supreme Court has explicitly held that precondemnation activities do not constitute takings. The Court has stated:

> Appellants also claim that the city's precondemnation activities constitute a taking. The State Supreme Court correctly rejected the contention that the municipality's good-faith planning activities, which did not result in successful prosecution of an eminent domain claim, so burdened the appellants' enjoyment of their property as to constitute a taking. Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are incidents of ownership. They cannot be considered as a taking in the constitutional sense.

Agins v. City of Tiburon, 447 U.S. 255, 263 n.9 (1980) (citations and internal quotations marks omitted); *see also Danforth v. United States*, 308 U.S. 271, 285 (1939) (stating that "[a] reduction or increase in the value of property . . . by reason of legislation for or the beginning or completion of a project" does not constitute a taking). The Supreme Court later cited *Agins* and *Danforth* with approval for the proposition that "depreciation in value of [ ] property by reason of preliminary activity is not chargeable to the government." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 320 (1987).

There is no doubt that the siting announcement constitutes "preliminary activity" as that term is used in *First English,* as the announcement was but one step of many that the state had to pursue before it could condemn Santini's property. The Service never conducted the requisite on-site examination of Santini's property, never selected it as the preferred site, did not monitor it for twelve months as required by NRC regulations, and did not obtain the necessary permits from the NRC, the Connecticut Department of Environmental Protection, and the Connecticut siting council.

Despite *Agins, Danforth,* and *First English,* Santini argues that the siting announcement constitutes a taking under *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992) or, alternatively, under *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978). As Santini acknowledges, *Lucas* requires him to show that the siting announcement deprived him of all economically viable use of his property. *Lucas,* 505 U.S. at 1030. Santini cannot make this showing. Following the trial in Santini's state-court action, the Superior Court noted that "[n]one of the experts said plaintiffs' land had no economic or productive use except one expert said that the Ellridge [property] had no argicultural value and the Pinney Street land had lost one-half its value as agricultural land." *Santini v. Conn. Hazardous Waste Mgmt. Serv.,* No. CV 94 0538646S, 1998 WL 422166, at *5 (Conn. Super. July 13, 1998). Accordingly, the Superior Court found, and we agree, that "both [of Santini's properties] did have use and value after the notice." *Id.* The temporary nature of the siting announcement is significant. As the Supreme Court has stated, "Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on

economic use, because the property will recover value as soon as the prohibition is lifted." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 332 (2002). Indeed, Santini acknowledges that his property recovered at least some of its value after the siting announcement was withdrawn.

Nor can Santini succeed under *Penn Central*. First, to the extent there is any tension between *Penn Central* and *Agins*, we note that *Agins*, which was decided two years after *Penn Central*, held that precondemnation activity that restricts a landowner's ability to sell or develop property or causes a dimunition in its value does not constitute a taking. *Agins*, 447 U.S. at 263 n.9. Regardless, *Agins* is easily reconciled with *Penn Central*. The factors of "particular significance" to the *Penn Central* analysis are "[t]he economic impact of the regulation on the claimant," "the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the government action." *Penn Central*, 438 U.S. at 124. Though the siting announcement no doubt had an economic impact on Santini's property, and interfered with his investment-backed expectations to some extent, the character of the governmental action is of principal importance here. The Service's siting announcement obviously cannot be characterized as a "physical invasion" of Santini's property, *id.*, but, rather, merely one step along a path that might have led – but ultimately did not lead – to the government's acquisition of his property. The relatively swift overruling of the siting announcement is also significant, as the Supreme Court has held that "the duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim." *Tahoe-Sierra*, 535 U.S. at 342.

We are not unmindful of the economic impact that the siting announcement obviously had on Santini's efforts to develop and sell his property. Unfortunately for Santini, however, this impact does not necessarily mean that the governmental action of which he complains constitutes a taking. The Court recognized in *Penn Central* that "in a wide variety of contexts, . . . government may execute laws or programs that adversely affect recognized economic values." *Penn Central,* 438 U.S. at 124. Such programs are, as noted above, mere incidents of property ownership. *See Park Ave. Tower Assocs. v. City of New York,* 746 F.2d 135, 139 (2d Cir. 1984) (citing "legion of cases that have upheld regulations which severely diminished the value of commercial property"); *see also First English,* 482 U.S. at 320; *Agins,* 447 U.S. at 263 n.9; *Danforth,* 308 U.S. at 285. Santini cannot "satisfy the heavy burden placed upon one alleging a regulatory taking." *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 493 (1987). Therefore, whatever the economic impact of the siting announcement upon Santini's property, no compensable taking occurred.

Our decision also makes for sound public policy. As the Connecticut Supreme Court noted, "if the government were to be considered as having accomplished a compensable taking as a result of mere planning that, because of its publicity, harmed the value of the property, public planning would be discouraged, and governmental secrecy in the planning process would be encouraged." *Santini v. Conn. Hazardous Waste Mgmt. Serv.,* 251 Conn. 121, 142 (1999). Similarly, in declining to adopt a categorical rule that temporary regulations depriving property owners of all economically viable use of their property constitute takings, the Supreme Court

observed, "A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking." *Tahoe-Sierra*, 535 U.S. at 335; *see also id.* at 337 (rejecting narrower *per se* rule because "it would still impose serious financial constraints on the planning process"). We do not believe that the Takings Clause requies a state to choose among planning in secret, not planning at all, and exposing itself to takings claims from every property owner whose land might be affected by its plans. According, the Service is entitled to judgment on the merits of Santini's Fifth Amendment takings claim.

CONCLUSION

For these reasons, we affirm the judgment of the District Court.

APPENDIX B

[Filed Aug 27 2002]

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

No. 3:01cv563 (WWE)

EVANDRO S. SANTINI and
SANTINI HOMES, INC.,

Plaintiffs,

v.

CONNECTICUT HAZARDOUS WASTE
MANAGEMENT SERVICE,

Defendant.

RULING ON MOTION TO DISMISS AND CROSS-MOTION FOR SUMMARY JUDGMENT

This case concerns an alleged taking of property by Connecticut Hazardous Waste Management Service in violation of the Fifth Amendment of the United States Constitution. The Plaintiffs, Evandro Santini and Santini Homes, have previously litigated their Connecticut State Constitutional claim to the Connecticut Superior Court and the Connecticut Supreme Court. In that action, the Connecticut Supreme Court affirmed the Superior Court's holding that no constitutional taking had occur-

red. *Santini v. Connecticut Hazardous Waste Management Service*, 251 Conn. 121 (1999).

The defendant has filed a motion to dismiss. The parties have also filed cross-motions for summary judgment. After consideration of the pending motions, defendant's motion to dismiss will be granted on the basis of the doctrine of federal jurisdiction formulated in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983) (the "*Rooker-Feldman* doctrine"). In the alternative, even if federal jurisdiction does exist, defendant's motion for summary judgment will be granted on the basis of collateral estoppel and on the merits of the claim.

BACKGROUND

The parties have submitted affidavits, exhibits and Local Rule 9(c) statements of facts, which reveal the following undisupted facts. These undisputed facts are also reflected in *Santini v. Connecticut Hazardous Waste Management Service*, 251 Conn. 121 (1999).

Evandro Santini is a developer of residential homes, and Santini Homes is the corporation used by Mr. Santini to develop real estate properties. Connecticut Hazardous Waste Management Service ("Service") is a quasi-public government agency established pursuant to Connecticut General Statutes Section 22a-163, *et. seq.*, with the responsibility to site a facility for the disposal of low-level radioactive waste.

In 1985, the plaintiffs acquired land in Ellington, Connecticut, and obtained approval for a 16-lot subdivision to be known as Ellridge Estates. The plaintiffs' goal was to create up to 100 homes. In support of this goal, the plaintiff installed road, sewer and drainage improvements.

In March, 1988, Santini purchased an adjoining 54-acre parcel that has substantial frontage on a town road called Pinney Street.

In 1987, after conducting due diligence and market research, the plaintiffs began construction of model homes in Ellridge Estates. From 1989 through the spring of 1991, construction of Ellridge Estates proceeded slowly due to the growing regional real estate recession. As of June, 1991, plaintiffs had, *inter alia,* subdivision approval for 16 homes; and an equity investment in 75 acres, subdivision improvements, four constructed model homes of more than $5 million; a vested property right under state law to proceed with residential construction; and as-of-right zoning for the balance of the development plan for the 54 acres.

On June 10, 1991, the Service announced that a site, which included the plaintiffs' property, was one of three sites under consideration for a low-level radioactive waste disposal facility. Any one of these three sites could have become a "preferred site" to become the location for the disposal facility. On June 30, 1991, the plaintiffs' property was depicted on the front page of *The Hartford Courant* alongside the international symbol for radioactivity.

No site was actually ever selected as the preferred site. After selection of a preferred site, additional administrative requirements would have had to take place. Certain permits from the federal Nuclear Regulatory Commission, the state department of environmental protection, and the Connecticut siting council would have been required. Any proposed facility would also have been subject to regulations and restrictions imposed by "any town, city or borough," which would have been subject to review by the siting council. *See* Conn. Gen. Stat. Section 22a-163n(b). Finally, if these requirements had

been satisfied, eminent domain proceedings would have to proceed, and the property owner would have to be compensated. Conn. Gen. Stat. §22a-1632(b) and (c).

In January, 1992, the governor's office proposed legislation to rescind the statutury acquisition of a public facility for the disposal of low-level radioactive waste in Connecticut. On May 5, 1992, the legislature repealed the siting announcement.

DISCUSSION

A. Standard of Review

Motion to Dismiss

The function of a motion to dismiss is "merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." *Ryder Energy Distribution v. Merrill Lynch Commodities, Inc.*, 743 F.2d 744, 779 (2d Cir. 1984). When deciding a motion to dismiss, the Court must accept as true the well pleaded allegations of the complaint. *Albright v. Oliver*, 510 U.S. 266, 268 (1994). In addition, the allegations of the complaint should be construed favorably to the pleader. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1973). A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

A motion to dismiss under FRCP 12(b) (1) "challenges the court's statutory or constitutional power to adjudicate the case before it." 2A James W. Moore et. al., Moore's Federal Practice, P 12.07, at 12-49 (2d ed. 1944). Once the question of jurisdiction is raised, the burden of establishing subject matter jurisdiction rests on

the party asserting such jurisdiction. *Thomson v. Gaskill*, 315 U.S. 442, 446 (1942).

Motion Summary Judgment

A motion for summary judgment will be granted where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "Only when reasonable minds could not differ as to the import of the evidence is summary judgment proper." *Bryant v. Maffucci*, 923 F. 2d 979, 982 (2d Cir.), *cert. denied*, 502 U.S. 849 (1991).

The burden is on the moving party to demonstrate the abesnce of any material factual issue genuinely in dispute. *American International Group, Inc. v. London American International Corp.*, 664 F. 2d 348, 351 (2d Cir. 1981). In determining whether a genuine factual issue exists, the court must resolve all ambiguities and draw all reasonable inference against the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). If a nonmoving party has failed to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof, then summary judgment is appropriate. *Celotex Corp.*, 477 U.S. at 323. If the nonmoving party submits evidence which is "merely colorable," legally sufficient opposition to the motion for summary judgment is not met. *Anderson*, 477 U.S. at 249.

B. Analysis

Rooker-Feldman Doctrine

In its motion to dismiss, dependent argues that the *Rooker-Feldman* doctrine deprives this Court of federal jurisdiction. *Rooker-Feldman* is an abstention doctrine premised on the proper scope of federal jurisdiction. The

doctrine provides that the lower federal courts lack subject matter jurisdiction over a case if the exercise of jurisdiction over that case would result in the reversal or modification of a state court judgment. *Hachamovitch v. DeBuono*, 159 F.3d 687, 693 (2d Cir. 1998).

In *Rooker*, 263 U.S. 413, the U.S. Supreme Court held that federal district courts lack jurisdiction to review state court decisions, even if those decisions are erroneous. In *Feldman*, 460 U.S. 462, the Court held that a United States District Court has no authority to review final judgments of a state court in judicial proceedings, which included judgments on claims that were "inextricably intertwined" with the State court's determinations.

The Second Circuit has interpreted the Supreme Court's use of "inextricably intertwined" to mean that "where a plaintiff had an opportunity to litigate a claim in a state proceeding (as either a plaintiff or defendant in that proceeding), subsequent litigation of the claim will be barred under the *Rooker-Feldman* doctrine if it would be barred under the principles of preclusion." *Moccio v. New York State Office of Court Admin.*, 95 F. 3d 195 (2d Cir. 1996). Thus this court must decide whether the *Rooker-Feldman* doctrine applies to plaintiffs' claims by turning to the arguments made in defendant's motion for summary judgment that plaintiffs' claim is barred by the doctrines of *res judicata* and collateral estoppel.

Federal courts are required to give a prior state court decision the same preclusive effect under either *res judicata* or collateral estoppel that courts of that state would give to that decision. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 466 (1982). State law determines whether a prior state-court proceeding has any preclusive effect in a subsequent action pending in federal court. *See Fayer v. Middlebury*, 258 F.3d 117, 124 (2d Cir. 2001).

To establish that a claim is barred by the doctrine of *res judicata* and obtain summary judgment, a party must establish that there are no genuine issues of material fact in relation to each of the following elements: (1) the identity of the parties is the same as in the prior action (or privity is sufficiently established); (2) the same claim, demand or cause of action is at issue; (3) the judgment in the prior action was rendered on the merits by a court of competent jurisdiction; and (4) the parties had the opportunity to fully and fairly litigate the matter. *See Tirozzi v. Shelby Ins. Co.*, 50 Conn. App. 680, 686-87, *cert. denied*, 247 Conn. 945 (1998).

Under the doctrine of collateral estoppel, the judgment of a prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action. *Parklane Hoisery Co. v. Shore*, 439 U.S. 322, 327 n.5 (1979). A party raising a defense of collateral estoppel must demonstrate that an issue that is presented in the second case was fully and fairly litigated. *Jackson v. R.G. Whipple, Inc.*, 225 Conn. 705, 714-15 (1993). The issue must have been necessary to the judgment in the first case. *Gladysz v. Planning & Zoning Comm.n*, 256 Conn. 249, 261 (2001). If an issue has been derermined, but the judgment is not dependent upon determination of the issue, the parties may relitigate the issue in a subsequent action. *Delahunty v. Massachusetts Mutual Life Insurance Company*, 236 Conn. 582 (1996).

In this instance, plaintiffs filed the first lawsuit to comply with an interpretation of a ripeness requirement for a takings claim as articulated in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 195 (1985). Specifically, plaintiffs cite language from *Williamson*, in which the Supreme Court stated that if "a State provides an adequate procedure for

seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and has been denied just comensation." Plaintiffs assert that *Williamson County* means that a property owner cannot bring a federal claim until he has litigated his takings claim in the state court using state procedures and has been denied just compensation.

At present, federal law demarcates no clear approach to determine the preclusive effect of a previous state court action instituted by a property owner in order to satisfy the ripeness requirement of *Williamson County*. In *Wilkinson v. Pitkin County Board of Comm'rs.*, 142 F. 3d 1319 (10th Cir. 1998), a federal takings claim was barred from litigation in federal court where the Fifth Amendment claim was actually raised and litigated during the state court proceedings. In *Fields v. Sarasota Manatee Airport Authority*, 953 F. 2d 1299, 1304 (11th Cir. 1992), the Eleventh Circuit held that since the federal claim could have been raised in state court, the federal claim had been extinguished by the state proceeding. The Ninth Circuit, however, has indicated that the relevant inquiry is whether the state decision on the state constitutional claim represented an equivalent determination for the federal takings claim, so as to invoke the doctrine of issue preclusion. *Dodd v. Hood River County*, 59 F. 3d 852 (9th Cir. 1995). Similarly, in *Treister v. City of Miami*, 893 F. Supp. 1057, 1067-68 (S.D. Fla. 1992), *affirmed*, 56 F. 3d 1389 (11th Cir. 1995), a state court's decision that was sufficiently parallel to the federal adjudication had preclusive effect on a subsequent federal takings action in federal court.

In this instance, the Court considers the appropriate inquiry to be whether the state decision on plaintiff's Connecticut constitutional claim represents an equiva-

lent determination of a federal Fifth Amendment claim. In making this determination, the Court reviews whether the Takings Clause of the Fifth Amendment requires a broader inquiry than the claim pursuant to the Connecticut Constitution. *See Dodd v. Hood River County*, 136 F. 3d 1219, 1224 (9th Cir. 1998). If so, then the Fifth Amendment claim was not fully and fairly adjudicated, and the issues relevant to Fifth Amendment takings analysis were not necessary to detemrine the state court decision.

On appeal to the Connecticut Supreme Court, the plaintiffs argued that the trial court improperly concluded that (1) the designation of the plaintiffs' properties among the three finalists for acquisition and development as a disposal facility for low-level radioactive waste was not a practical confiscation and not an inverse condemnation under the state constitution; (2) the defendant's conduct did not amount to an inverse condemnation under the alternative balancing test; and (3) mere governmental planning does not constituee a taking, in the constitutional sense. The Connecticut Supreme Court affirmed that governmental planning does not, as a matter of law, constitute a taking under article first, § 11, of the state constitution, and that defendant's conduct constituted planning. Because defendant's planning did not constitute a taking, the Court held that it was not necessary to discuss the plaintiffs' factual claims of loss of economic use.

Further, in reaching its conclusion, the Connecticut Supreme Court stated that it had restricted itself to the claim concerning the Connecticut Constitution. However, in what appears a response to plaintiff's argument that the Connecticut Constitution does not provide less pro-

tection for individual rights than that furnished by the Fifth Amendment, the Court noted that:

> None of the parties argues that our state constitution provides different protection for property owners from that afforded by the federal constitution. Furthermore, we are not aware of any doctrine, cases or reason that would compel, in the context of this case, the treatment of the plaintiffs' state constitutional claims different than the treatment those claims would have been given had we been adjudicating the plaintiffs' claims under the federal constitutional takings jurisprudence. We, therefore, assume for the purposes of this appeal that article first, §11, of our state constitution affords the same protection as that provided under its federal counterpart.

Santini, 251 Conn. at 136 n.20.

The Connecticut Supreme Court went on to reject the plaintiffs' contention that existing Connecticut precedent namely *Textron, Inc. v. Wood,* 167 Conn. 334, 350 (1974) which holds that governmental planning does not constitute a taking, cannot survive current federal jurisprudence. In *Textron,* the Connecticut Supreme Court held that a substantial interference involving the invasion of some specific legal interest in the property required a "definitive indication that the state's intent to condemn the property in question has become fixed and irreversible." 167 Conn. at 348. The Court explained the two reasons for requiring a definitive, fixed and irreversible intention as (1) once the state has reached a final decision, no one can interfere with the sovereign's right to properly exercise its power of eminent domain, and (2) without such a requirement, both the state and property owner would be deprived of the capacity to reasonably

gauge their respective rights and effectively plan their future activities.

In consideration of *Santini*, the Connecticut Supreme Court reconciled the holding of *Textron* with existing federal jurisprudence as represented in *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 321 (1987). The Court noted that *First English* states that "depreciation in the value of property" by reason of preliminary government action, which is consistent with the holding that government planning cannot constitute a taking.

This Court agrees with the state Supreme Court that its holding is consistent with federal jurisprudence relevant to Fifth Amendment takings analysis. Plaintiffs' claim would not be afforded a broader standard than that articulated by the Connecticut Supreme Court.

It is well established that a "final decision" must be rendered by the government agency prior to the institution of a Fifth Amendment takings claim. *Williamson County*, 473 U.S. at 186. *Williamson County* instructs that a final decision is necessary because the inquiry into economic impact of the challenged action cannot be evaluated until the state has "arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." Similarly, the Second Circuit has elaborated that, without a final decision, a court cannot determine adequately the economic loss occasioned by the government action. *Southview Associates, LTD. v. Bongartz*, 980 F. 2d 84 (1992). A plaintiff may not satisfy the final decision requirement where the possibility exists that some use exists that would enable the plaintiff to derive economic benefit from the property. *See MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 352 (1986).

This Court finds the Connecticut Supreme Court's standard as to whether government action constitutes a "fixed and irreversible intention" to be an analogue to federal law requiring a "final decision."[1] Both standards have the purpose of enabling the court to assess the rights of the parties relevant to the challenged action. For purposes of collateral estoppel, the issue necessary to to the Connecticut Supreme Court's decision – is identical to consideration required for the instant federal takings claim.

In its analysis of defendant's conduct, the Connecticut Supreme Court reviewed the facts that the defendants had yet to select a property as the "ultimate disposal site"; that further study "was necessary before any final such choice was to be made"; and that there remained several administrative requirements to be met in order for "the preferred site finally to be selected for construction of the disposal facility." The Court noted further that no witness who testified regarded the plaintiffs' property as the final site for the disposal facility. Analysis of these identical facts would have been required to determine whether defendant's conduct constituted a final decision relevant to the federal takings claim. Accordingly, the Court finds that the federal takings claim is inextricably intertwined with the Connecticut Supreme Court's judgment, and therefore barred under the *Rooker-Feldman* doctrine[2].

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[1]The Court notes that the Connecticut Supreme Court even uses "final decision" interchangeably with "fixed and irreversible intention." *See Santini*, 251 Conn. at 142.

[2]Plaintiffs argue that the *Rooker-Feldman* doctrine should not apply in light of *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), wherein the Supreme Court held

[footnote continued]

The Court is unpersuaded by plaintiffs' argument that either collateral estoppel or *Rooker-Feldman* is inapplicable in light of the state court's failure to consider the tests set forth in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) and *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). As discussed previously, the Court must find that defendants' conduct constituted a final decision prior to measuring the economic impact of the defendant's action as required by *Lucas* and *Penn Central*. Accordingly, this Court will grant the defendant's motion to dismiss on the basis of the *Rooker-Feldman* doctrine. In the event that *Rooker-Feldman* does not bar this claim, summary judgment is appropriate on the basis of collateral estoppel.

Finally, even if collateral estoppel and *Rooker-Feldman* do not apply, summary judgment in defendant's favor is appropriate due to the lack of a final decision as required by *Williamson County*. The defendant's selection of plaintiffs' property as one of three sites proposed for radioactive disposal left open the possibility that plaintiffs' property would not ultimately be selected as the radioactive disposal site.

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that a litigant who commenced a federal claim in federal court but was relegated to state court could file with a federal court a reservation of intent to pursue the federal claim later. However, plaintiff has not persuaded this Court that such a reservation is applicable to the instant case.

CONCLUSION

For the foregoing reasons, the defendant'. motion to dismiss [document #18] is GRANTED; the defendant's for summary [document #20] is GRANTED; and plaintiffs' motion for summary judgment [document #23] is DENIED. The clerk is instructed to enter judgment in favor of the defendant and to close this case.

SO ORDERED.

/s/ Warren W. Eginton
Warren W. Eginton, Senior U.S. District Judge

Dated at Bridgeport, Connecticut this 27th day of August, 2002.

APPENDIX C

[Filed APR 2 2004]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

Roseann B. MacKechnie
Clerk

Docket Number:	02-9150-cv
Short Title:	Santini v. Connecticut Mgmt Svc
DC Docket Number:	01-cv-563
DC:	DISTRICT OF CONNECTICUT (NE
DC Judge:	Honorable Warren Eginton

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 2nd day of April two thousand four.

Present:

Hon. Jon O. Newman,

Hon. Ralph K. Winter,

Hon. Barrington D. Parker,
CIRCUIT JUDGES,

EVANDRO S. SANTINI and SANTINI HOMES, INC.,
Plaintiffs - Appellants,

v.

Docket No. 02-9150

CONNECTICUT HAZARDOUS WASTE MANAGEMENT SERVICE,
Defendant - Appellee.

A petition for panel rehearing having been filed herein by Appellants EVANDRO S. SANTINI and SANTINI HOMES, INC.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

For the Court,
Roseann B. MacKechnie, Clerk

By: /s/ Arthur M. Heller
Arthur M. Heller
Motions Staff Attorney

APPENDIX D

EXCERPT, TRIAL COURT TESTIMONY ON CROSS-EXAMINATION BY SANTINI'S COUNSEL OF SUSAN SHIMELMAN, UNDERSECRETARY OF THE CONNECTICUT OFFICE OF POLICY AND MANAGEMENT

FEBRUARY 27, 1998
(stipulated record at A-1835)

Santini counsel: By 1991, the [site selection/condemnation] process had been going on for some 11 years, had it not?

Ms. Shimelman: Correct.

Santini counsel: It was near the end of the process, very close to the acquisition step?

Ms. Shimelman: Correct.

Santini counsel: And it wasn't preliminary at that point; it wasn't tentative, correct?

Ms. Shimelman: Correct.

Santini counsel: In your words, the service [sic] had no alternative but to proceed at that point?

Ms. Shimelman: Correct.

APPENDIX E

EXCERPT, TRIAL COURT TESTIMONY ON CROSS-EXAMINATION BY SANTINI'S COUNSEL OF RONALD GINGERICH, EXECUTIVE DIRECTOR, CONNECTICUT HAZARDOUS WASTE MANAGEMENT SERVICE

FEBRUARY 25, 1998
(stipulated record at A-1525 to A-1527)

Q. Now, Mr. Santoro [Service's counsel] in some of his questions referred to other permits, contingencies that would have needed to have been satisfied before an actual facility was built. Can you – are you able to give us a relatively complete list of what those other permits are?

A. Yes, I am.

Q. Go ahead.

A. The first would be a license from the Nuclear Regulatory Commission; the second would be a permit or permits from the Department of Environmental Protection; the third would be a certificate of public safety and need from the Connecticut siting council; and fourth would be approvals from local planning and zoning and wetlands agencies. However, there is a provision in state law whereby the siting council can override a denial of approval by those local agencies.

Q. [It] was the state that was actually going to do the acquisition?

A. The Department of Public Works is responsible for acquiring the site.

Q. [W]ould the Department of Public Works have acquired the site and then the agency would have proceeded with these other permits and approvals, or would it have been the other way around?

A. I don't know.

Q. Did that not come up in the process?

A. It was left up to the Department of Public Works how they would go about acquiring the site. They're limited in statute to acquiring the one we selected, but when they actually acquired it, it was left to their discretion.

APPENDIX F

EXCERPT, TRIAL COURT TESTIMONY ON CROSS-EXAMINATION BY SANTINI'S COUNSEL OF DR. WILLIAM KINNARD, EXPERT REAL ESTATE APPRAISER CALLED BY CONNECTICUT HAZARDOUS WASTE MANAGEMENT SERVICE

MARCH 5, 1998
(stipulated record at A-2166 to A-2169)

Q. [Your] discounted cashflow analysis applying the fifteen percent discount rate extends that over a full twenty-four months with no assumption of any revenue in between?

A. No assumption of any revenue, that is correct.

Q. You also testified that during the designation period Elridge Estates had some value, do you recall that?

A. Yes, sir.

Q. But you said on page sixty-eight of your report that there could be no sales, no development and essentially no value for its highest and best use, single family residential sales, is that correct?

A. I'm on page fifty-eight.

Q. Sixty-eight.

A. Sixty eight? Sorry. It does – I do say no sales – no sales could reasonably have expected to have occurred and no development activity on the Pinney Street property could reasonably have been expected to occur, that is correct. I didn't say anything about no value, however.

Q. You also mentioned recreational use. Do you know whether the zoning would allow any type of revenue producing recreational use on Elridge Estates?

A. I do not.

* * *

Q. Now, overall, Dr. Kinnard, in your report is there anything, any calculation of rental value, recreational value, any value at all for these properties between June 1991 and June 1992?

A. No, sir, there is not.

(3)

Supreme Court, U.S.
FILED
AUG 24 2004
OFFICE OF THE CLERK

No. 04-142

In The

Supreme Court Of The United States

EVANDRO S. SANTINI, et al.,
Petitioners,

v.

CONNECTICUT HAZARDOUS WASTE MANAGEMENT SERVICE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD BLUMENTHAL
ATTORNEY GENERAL
OF CONNECTICUT

* ROBERT D. SNOOK
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(860) 808-5020

* *Counsel of Record*

QUESTION PRESENTED

Whether the courts below correctly entered summary judgment against Petitioners' takings claim, when the property in question was never taken or occupied, physically or legally, and the courts found as a matter of fact that the property retained value to Petitioners throughout the eleven months when a possible future taking was under public consideration?

PARTIES TO THE PROCEEDING

The parties to this case are:

Plaintiffs/Petitioners: Evandro S. Santini
Alfred Drive
Tolland, CT 06084

Santini Homes, Inc.
1031 Hartford Turnpike
Vernon, CT 06066-4407

Defendant/Respondent: Connecticut Hazardous Waste Management Service
100 Constitution Plaza
Hartford, CT 06103

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IN THE
SUPREME COURT OF THE UNITED STATES

EVANDRO S. SANTINI, et al.,

Petitioners,

v.

CONNECTICUT HAZARDOUS WASTE MANAGEMENT SERVICE,

Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

COUNTER-STATEMENT OF THE CASE

On June 10, 1991, the Connecticut Hazardous Waste Management Service ("Service") announced that a parcel of land owned by Evandro S. Santini and Santini Homes, Inc. (hereinafter collectively known as the "Petitioners" or "Santini") was one of the three sites being considered for potential acquisition for a disposal facility for low-level radioactive waste. Eleven months later, the Service completely ended all consideration of the possibility of taking Petitioners' land. Petitioners sued, claiming that the June 10th announcement constituted a temporary taking of their property under Article First, Section 11 of the Connecticut Constitution.

After a trial on the merits, the trial court held, as a matter of law, that the Service had engaged only in planning and preparatory activities which did not constitute a taking. *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, No. CV 94 053 8646S, 1998 WL 422166 at *5 (Conn. Super. July 13, 1998). Furthermore, the trial court found, as a matter of fact, that even if the Service's activities went beyond planning, a taking did not occur because the Petitioners retained use and value in their property. *Id.*[1]

Petitioners sought review in the Connecticut Supreme Court, which upheld the decision of the trial court. *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 251 Conn. 121, 739 A.2d 680 (1999). Petitioners unsuccessfully sought a writ of certiorari to this Court. 520 U.S. 1225 (2000).

Santini then filed a complaint in federal district court alleging a taking under the Fifth Amendment to the United States Constitution. The Service moved to dismiss on procedural grounds, primarily lack of jurisdiction under the *Rooker-Feldman* doctrine and because the state court decisions barred a second action in federal court under the doctrines of res judicata and collateral estoppel. The Service also moved for summary judgment on the merits because the uncontroverted facts showed that no taking had occurred. The district court granted both of the Service's

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[1] The Petition implies that the land in question retained no value after the announcement. Petition, pp. 3, 4, 9-11, fns. 1, 2, 8, and 9. This claim was rejected by not only the trial court, but also the state supreme court and the Second Circuit, which all agreed that Santini's property retained use and value throughout the time in question. *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 251 Conn. at 135, n. 19; *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 342 F.3d 118, 131 (2003).

motions. *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, No. 3:01cv563 (D. Conn. Aug. 27, 2002) (Unpublished opinion attached hereto.)

Santini appealed to the United States Court of Appeals for the Second Circuit. The Court of Appeals concluded, contrary to the district court, that res judicata, collateral estoppel and the *Rooker-Feldman* doctrine did not bar the action. Nevertheless, the court upheld the determination of the district court on the merits that no taking had occurred and that entry of summary judgment for the Service was appropriate. *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 342 F.3d 118, 130-31 (2003). The Second Circuit subsequently denied a rehearing petition and Santini filed this timely petition for certiorari.

REASONS FOR DENIAL OF THE PETITION

SUMMARY

This petition for a writ of certiorari should be denied because, as every court that has considered this case has concluded, the "fact that Santini's taking claim is based on nothing more than the Service's 1991 announcement – perhaps the prototypical precondemnation governmental activity – dooms the claim on its merits." *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 342 F.3d 118, 130 (2003), *see also*, *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 251 Conn. 121, 140, 144, 739 A.2d 680 (1999); *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, No. CV 94 053 8646S, 1998 WL 422166 at *5 (Conn. Super. July 13, 1998). In fact, no taking occurred in this case because the Service's actions never proceeded beyond the planning stage. The Service never acquired the Petitioner's property, never physically occupied the site, never obtained any of the necessary permits to build the facility, and never

completed (in fact barely began) the site characterization necessary to determine if Santini's property, or any of the other potential sites, was even suitable for a disposal facility. Thus, the government never did anything more than begin the study and planning necessary for a project that was quickly abandoned. Further, the state trial court found, as a matter of fact, that Santini's property never lost all use or value. The state supreme court, the federal district court and the Court of Appeals agreed that the property retained value. The factual record is clear that no taking under the Constitution ever occurred.

Furthermore, this case presents no new, novel or unresolved issues regarding takings. This Court has long held that public planning pre-condemnation activity is not, by itself, a taking or acquisition of property. The decision below is fully consistent with this well-established law and it does not conflict with the decision of any other federal courts of appeals.

ARGUMENT

The obvious central flaw in Petitioners' case is that the only government action complained of is the 1991 announcement by the Service that Petitioners' land was one of three sites it was considering for possible future acquisition for a low-level radioactive waste disposal facility. As the courts below, both state and federal, have found:

> Even if Santini's property had been designated the preferred site, it still would have had to clear a number of regulatory hurdles before becoming the location of the waste disposal facility. For example, permits from the NRC, the Connecticut Department of Environmental Protection,

> and the Connecticut siting council, as well as eminent domain proceedings, *see* Conn. Gen. Stat. §22a-163w(b)(c)(1995), would have been required.

Santini v. Conn. Hazardous Waste Mgmt. Serv., 342 F.3d 118, 122 & n. 3 (2003), *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 251 Conn. 121, 125-26 & n. 6, 739 A.2d 680 (1999); *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 1998 WL 422166 (Conn. Super. 1998).

Ultimately, no site was chosen and none of the necessary state or federal permits was ever obtained. The Service not only never took the Petitioners' property, it never went beyond the planning or pre-condemnation phase of its project before, in less that a year, it abandoned the entire project.

This Court has explicitly determined that governmental planning activities of this nature do not constitute takings. The Second Circuit quoted directly from this Court's controlling decisions as follows:

> "Appellants also claim that the city's pre-condemnation activities constitute a taking. The State Supreme court correctly rejected the contention that the municipality's good-faith planning activities, which did not result in successful prosecution of an eminent domain claim, so burdened the appellants' enjoyment of their property as to constitute a taking. Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the

> process of governmental decision making, absent extraordinary delay, are incidents of ownership. They cannot be considered as a taking in the constitutional sense."
>
> *Agins v. City of Tiburon*, 447 U.S. 255, 263 n.9 (1980) (citations and internal quotations marks omitted); see also *Danforth v. United States*, 308 U.S. 271, 285 (1939) (stating that "[a] reduction or increase in the value of property ... by reason of legislation for or the beginning or completion of a project" does not constitute a taking). The Supreme Court later cited *Agins* and *Danforth* with approval for the proposition that "depreciation in value of [] property by reason of preliminary activity is not chargeable to the government." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 320 (1987).

Santini, 342 F.3d at 130-131. The Second Circuit continued:

> There is no doubt that the siting announcement constitutes "preliminary activity" as that term is used in *First English*, as the announcement was but one step of many that the state had to pursue before it could condemn Santini's property. The Service never conducted the requisite on-site examination of Santini's property, never selected it as the preferred site, did not monitor it for twelve months as required by NRC regulations, and did not obtain the necessary permits from the NRC, the Connecticut Department of Environmental

> Protection, and the Connecticut siting council.

Id. at 131.

Based on these facts, the district court and the Court of Appeals found that the Service was merely engaged in necessary planning and study preparatory to a potential acquisition of property that never occurred and that, under the controlling precedents of *Agins* and *First English*, no taking occurred.

Finally, the Second Circuit acknowledged the Petitioners' apparent claim that *Agins*, *Danforth*, and *First English* somehow do not control this case, and that the analysis under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) or *Penn Central Transportation Co. v. New York*, 438 U.S. 104 (1978) is required. The court accurately noted that *Lucas* requires a showing that the siting consideration announcement deprived Santini of <u>all</u> economically viable use of his property and that Santini had not, as a matter of fact, made that showing as the properties "did have use and value after the notice." *Santini, supra.* at 131. The Court of Appeals also properly rejected the *Penn Central* argument as the government's action here, a mere announcement of consideration for possible future acquisition, was obviously not of the character which could constitute a taking. *Id.* at 132.

CONCLUSION

This case involves a routine application of controlling precedent to facts which the four courts below have all agreed upon. The Second Circuit correctly determined that the Service's announcement that it was considering three sites for suitability for potential future condemnation, an action the court called "perhaps the prototypical pre-condemnation governmental activity," did not constitute a taking.

Respectfully submitted,

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No. 04-142

In The

Supreme Court Of The United States

EVANDRO S. SANTINI, et al.,

Petitioners,

v.

CONNECTICUT HAZARDOUS WASTE MANAGEMENT SERVICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

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Santini v. Conn. Hazardous Waste Mgmt Service Serv., No. 3:01cv563. (D. Conn. Aug. 27, 2002) (Unpublished opinion) 2-A

[Filed Aug 27 2002]

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

No. 3:01cv563 (WWE)

EVANDRO S. SANTII and
SANTINI HOMES, INC.,

Plaintiffs,

v.

CONNECTICUT HAZARDOUS WASTE
MANAGEMENT SERVICE,

Defendant.

RULING ON MOTION TO DISMISS AND
CROSS-MOTIONS FOR SUMMARY JUDGMENT

This case concerns an alleged taking of property by Connecticut Hazardous Waste Management Service in violation of the Fifth Amendment of the United States Constitution. The plaintiffs, Evandro Santini and Santini Homes, have previously litigated their Connecticut State Constitutional claim to the Connecticut Superior Court and the Connecticut Supreme Court. In that action, the Connecticut Supreme Court affirmed the Superior Court's holding that no constitutional taking had occurred. Santini v Connecticut Hazardous Waste Management Service, 251 Conn. 121 (1999).

The defendant has filed a motion to dismiss. The parties have also filed cross-motions for summary judgment. After consideration of the pending motions, defendant's motion to dismiss will be granted on the basis of the doctrine of federal jurisdiction formulated in Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) (the "Rooker-Feldman doctrine"). In the alternative, even if federal jurisdiction does exist, defendant's motion for summary judgment will be granted on the basis of collateral estoppel and on the merits of the claim.

BACKGROUND

The parties have submitted affidavits, exhibits and Local Rule 9 statements of facts, which reveal the following undisputed facts. These undisputed facts are also reflected in Santini v Connecticut Hazardous Waste Management Service, 251 Conn. 121 (1999).

Evandro Santini is a developer of residential homes, and Santini Homes is the corporation used by Mr. Santini to develop real estate properties. Connecticut Hazardous Waste Management Service ("Service") is a quasi-public governmental agency established pursuant to Connecticut General Statutes Section 22a-163, et seq., with the responsibility to site a facility for the disposal of low-level radioactive waste.

In 1985, the plaintiffs acquired land in Ellington, Connecticut, and obtained approval for a 16-lot subdivision to be known as Ellridge Estates. The plaintiffs' goal was to create up to 100 homes. In support of this goal, the plaintiff installed road, sewer and drainage improvements.

In March, 1988, Santini purchased an adjoining 54-acre parcel that has substantial frontage on a town road called Pinney Street.

In 1987, after conducting due diligence and market research, the plaintiffs began construction of model homes in Ellridge Estates. From 1989 through the spring of 1991, construction of Ellridge Estates proceeded slowly due to the growing regional real estate recession. As of June, 1991, plaintiffs had, inter alia, subdivision approval for 16 homes; and an equity investment in 75 acres, subdivision improvements, four constructed model homes of more than $5 million; a vested property right under state law to proceed with residential construction; and as-of-right zoning for the balance of the development plan for the 54 acres.

On June 10, 1991, the Service announced that a site, which included the plaintiffs' property, was one of three sites under consideration for a low-level radioactive waste disposal facility. Any one of these three sites could have become a "preferred site" to become the location for the disposal facility. On June 30, 1991, the plaintiffs' property was depicted on the front page of The Hartford Courant alongside the international symbol for radioactivity.

No site was actually ever selected as the preferred site. After selection of a preferred site, additional administrative requirements would have had to take place. Certain permits from the federal Nuclear Regulatory Commission, the state department of environmental protection, and the Connecticut siting council would have been required. Any proposed facility would also have been subject to regulations and restrictions imposed by "any town, city or borough," which would have been subject to

review by the siting council. See Conn. Gen. Stat. Section 22a-163n(b). Finally, if these requirements had been satisfied, eminent domain proceedings would have to proceed, and the property owner would have to be compensated. Conn. Gen. Stat. § 22a-163w(b) and (c).

In January, 1992, the governor's office proposed legislation to rescind the statutory acquisition of a public facility for the disposal of low-level radioactive waste in Connecticut. On May 5, 1992, the legislature repealed the siting announcement.

DISCUSSION

A. Standard of Review

Motion to Dismiss

The function of a motion to dismiss is "merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." Ryder Energy Distribution v. Merrill Lynch Commodities, Inc., 748 F.2d 774, 779 (2d Cir. 1984). When deciding a motion to dismiss, the Court must accept as true the well pleaded allegations of the complaint. Albright v. Oliver, 510 U.S. 266, 268 (1994). In addition, the allegations of the complaint should be construed favorably to the pleader. Scheuer v. Rhodes, 416 U.S. 232, 236 (1973). A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

A motion to dismiss under FRCP 12(b)(1) "challenges the court's statutory or constitutional power to adjudicate the case before it." 2A James W. Moore et. al.,

Moore's Federal Practice, P 12.07, at 12-49 (2d ed. 1994). Once the question of jurisdiction is raised, the burden of establishing subject matter jurisdiction rests on the party asserting such jurisdiction. Thomson v. Gaskill, 315 U.S. 442, 446 (1942).

Motion Summary Judgment

A motion for summary judgment will be granted where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). "Only when reasonable minds could not differ as to the import of the evidence is summary judgment proper." Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir.), cert. denied, 502 U.S. 849 (1991).

The burden is on the moving party to demonstrate the absence of any material factual issue genuinely in dispute. American International Group Inc. v. London American International Corp., 664 F. 2d 348, 351 (2d Cir. 1981). In determining whether a genuine factual issue exists, the court must resolve all ambiguities and draw all reasonable inferences against the moving party. Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 255 (1986). If a nonmoving party has failed to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof, then summary judgment is appropriate. Celotex Corp., 477 U.S. at 323. If the nonmoving party submits evidence which is "merely colorable," legally sufficient opposition to the motion for summary judgment is not met. Anderson, 477 U.S. at 249.

B. Analysis

Rooker-Feldman Doctrine

In its motion to dismiss, defendant argues that the Rooker-Feldman doctrine deprives this Court of federal jurisdiction. Rooker-Feldman is an abstention doctrine premised on the proper scope of federal jurisdiction. The doctrine provides that the lower federal courts lack subject matter jurisdiction over a case if the exercise of jurisdiction over that case would result in the reversal or modification of a state court judgment. Hachamovitch v. DeBuono, 159 F.3d 687, 693 (2d Cir. 1998).

In Rooker, 263 U.S. 413, the U.S. Supreme Court held that federal district courts lack jurisdiction to review state court decisions, even if those decisions are erroneous. In Feldman, 460 U.S. 462, the Court held that a United States District Court has no authority to review final judgments of a state court in judicial proceedings, which included judgments on claims that were "inextricably intertwined" with the state court's determinations.

The Second Circuit has interpreted the Supreme Court's use of "inextricably intertwined" to mean that "where a plaintiff had an opportunity to litigate a claim in a state proceeding (as either a plaintiff or defendant in that proceeding), subsequent litigation of the claim will be barred under the Rooker-Feldman doctrine if it would be barred under the principles of preclusion." Moccio v. New York State Office of Court Admin., 95 F.3d 195 (2d Cir. 1996). Thus this court must decide whether the Rooker-Feldman doctrine applies to plaintiffs' claims by turning to the arguments made in defendant's motion for summary

judgment that plaintiffs' claim is barred by the doctrines of res judicata and collateral estoppel.

Federal courts are required to give a prior state court decision the same preclusive effect under either res judicata or collateral estoppel that courts of that state would give to that decision. Kremer v. Chemical Constr. Corp., 456 U.S. 461, 466 (1982). State law determines whether a prior state-court proceeding has any preclusive effect in a subsequent action pending in federal court. See Fayer v. Middlebury, 258 F.3d 117, 124 (2d Cir. 2001).

To establish that a claim is barred by the doctrine of res judicata and obtain summary judgment, a party must establish that there are no genuine issues of material fact in relation to each of the following elements: (1) the identity of the parties is the same as in the prior action (or privity is sufficiently established); (2) the same claim, demand or cause of action is at issue; (3) the judgment in the prior action was rendered on the merits by a court of competent jurisdiction; and (4) the parties had the opportunity to fully and fairly litigate the matter. See Tirozzi v. Shelby Ins. Co., 50 Conn. App. 680, 686-87, *cert. denied*, 247 Conn. 945 (1998).

Under the doctrine of collateral estoppel, the judgment of prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.5 (1979). A party raising a defense of collateral estoppel must demonstrate that an issue that is presented in the second case was fully and fairly litigated. Jackson v. R.G. Whipple. Inc., 225 Conn. 705 714-15 (1993). The issue must have been necessary to the judgment in the first case. Gladysz v. Planning & Zoning Comm'n, 256 Conn. 249,

261 (2001). If an issue has been determined, but the judgment is not dependent upon determination of the issue, the parties may relitigate the issue in a subsequent action. Delahunty v. Massachusetts Mutual Life Insurance Company, 236 Conn. 582 (1996).

In this instance, plaintiffs filed the first lawsuit to comply with an interpretation of a ripeness requirement for a takings claim as articulated in Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 195 (1985). Specifically, plaintiffs cite language from Williamson, in which the Supreme Court stated that if "a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and has been denied just compensation." Plaintiffs assert that Williamson County means that a property owner cannot bring a federal claim until he has litigated his takings claim in the state court using state procedures and has been denied just compensation.

At present, federal law demarcates no clear approach to determine the preclusive effect of a previous state court action instituted by a property owner in order to satisfy the ripeness requirement of Williamson County. In Wilkinson v. Pitkin County Board of Comm'rs., 142 F.3d 1319 (10th Cir. 1998), a federal takings claim was barred from litigation in federal court where the Fifth Amendment claim was actually raised and litigated during the state court proceedings. In Fields v. Sarasota Manatee Airport Authority, 953 F. 2d 1299, 1304 (11th Cir. 1992), the Eleventh Circuit held that since the federal claim could have been raised in state court, the federal claim had been extinguished by the state proceeding. The Ninth Circuit, however, has indicated that the relevant inquiry is whether

the state decision on the state constitutional claim represented an equivalent determination for the federal takings claim, so as to invoke the doctrine of issue preclusion. Dodd v. Hood River County, 59 F.3d 852 (9th Cir. 1995). Similarly, in Treister v. City of Miami, 893 F. Supp. 1057, 1067-68 (S. D. Fla. 1992), affirmed, 56. F.3d 1389 (11th Cir. 1995), a state court's decision that was sufficiently parallel to the federal adjudication had preclusive effect on a subsequent federal takings action in federal court.

In this instance, the Court considers the appropriate inquiry to be whether the state decision on plaintiffs' Connecticut constitutional claim represents an equivalent determination of a federal Fifth Amendment claim. In making this determination, the Court reviews whether the Takings Clause of the Fifth Amendment requires a broader inquiry than the claim pursuant to the Connecticut Constitution. See Dodd v. Hood River County, 136 F. 3d 1219, 1224 (9th Cir. 1998). If so, then the Fifth Amendment claim was not fully and fairly adjudicated, and the issues relevant to Fifth Amendment takings analysis were not necessary to determine the state court decision.

On appeal to the Connecticut Supreme Court, the plaintiffs argued that the trial court improperly concluded that (1) the designation of the plaintiffs' properties among the three finalists for acquisition and development as a disposal facility for low-level radioactive waste was not a practical confiscation and not an inverse condemnation under the state constitution; (2) the defendant's conduct did not amount to an inverse condemnation under the alternative balancing test; and (3) mere governmental planning does not constitute a taking, in the constitutional sense. The Connecticut Supreme Court affirmed that

governmental planning does not, as a matter of law, constitute a taking under article first, § 11, of the state constitution, and that defendant's conduct constituted planning. Because defendant's planning did not constitute a taking, the Court held that it was not necessary to discuss the plaintiffs' factual claims of loss of economic use.

Further, in reaching its conclusion, the Connecticut Supreme Court stated that it had restricted itself to the claim concerning the Connecticut Constitution. However, in what appears a response to plaintiff s argument that the Connecticut Constitution does not provide less protection for individual rights than that furnished by the Fifth Amendment, the Court noted that:

> None of the parties argues that our state constitution provides different protection for property owners from that afforded by the federal constitution. Furthermore, we are not aware of any doctrine, cases or reason that would compel, in the context of this case, the treatment of the plaintiffs' state constitutional claims different than the treatment those claims would have been given had we been adjudicating the plaintiffs' claims under the federal constitutional takings jurisprudence. We, therefore, assume for the purposes of this appeal that article first, § 11, of our state constitution affords the same protection as that provided under its federal counterpart.

Santini, 251 Conn. at 136 n.20.

The Connecticut Supreme Court went on to reject the plaintiffs' contention that existing Connecticut precedent, namely Textron. Inc. v. Wood, 167 Conn. 334, 350 (1974) which holds that governmental planning does not constitute a taking, cannot survive current federal jurisprudence. In Textron, the Connecticut Supreme Court held that a substantial interference involving the invasion of some specific legal interest in the property required a "definitive indication that the state's intent to condemn the property in question has become fixed and irreversible." 167 Conn. at 348. The Court explained the two reasons for requiring a definitive, fixed and irreversible intention as (1) once the state has reached a final decision; no one can interfere with the sovereign's right to properly exercise its power of eminent domain, and (2) without such a requirement, both the state and property owner would be deprived of the capacity to reasonably gauge their respective rights and effectively plan their future activities.

In consideration of Santini, the Connecticut Supreme Court reconciled the holding of Textron with existing federal jurisprudence as represented in First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304, 321 (1987). The court noted that First English states that "depreciation in the value of property" by reason of preliminary government action, which is consistent with the holding that government planning cannot constitute a taking.

This Court agrees with the state Supreme Court that its holding is consistent with federal jurisprudence relevant to Fifth Amendment takings analysis. Plaintiffs' claim would not be afforded a broader standard than that articulated by the Connecticut Supreme Court.

It is well established that a "final decision" must be rendered by the government agency prior to the institution of a Fifth Amendment takings claim. Williamson County, 473 U.S. at 186. Williamson County instructs that a final decision is necessary because the inquiry into economic impact of the challenged action cannot be evaluated until the state has "arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." Similarly, the Second Circuit has elaborated that, without a final decision, a court cannot determine adequately the economic loss occasioned by the government action. Southview Associates, LTD. v. Bongartz, 980 F. 2d 84 (1992). A plaintiff may not satisfy the final decision requirement where the possibility exists that some use exists that would enable the plaintiff to derive economic benefit from the property. See MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 352 (1986).

This Court finds the Connecticut Supreme Court's standard as to whether government action constitutes a "fixed and irreversible intention" to be an analogue to federal law requiring a "final decision."[2] Both standards have the purpose of enabling the court to assess the rights of the parties relevant to the challenged action. For purposes of collateral estoppel, the issue necessary to the Connecticut Supreme Court's decision – the extent or

---

[2] The Court notes that the Connecticut Supreme Court even uses "final decision" interchangeably with "fixed and irreversible intention." *See Santini*, 251 Conn. at 142.

finality of the defendant's action – is identical to consideration required for the instant federal takings claim.

In its analysis of defendant's conduct, the Connecticut Supreme Court reviewed the facts that the defendants had yet to select a property as the "ultimate disposal site"; that further study "was necessary before any final such choice was to be made"; and that there remained several administrative requirements to be met in order for "the preferred site finally to be selected for construction of the disposal facility." The Court noted further that no witness who testified regarded the plaintiffs' property as the final site for the disposal facility. Analysis of these identical facts would have been required to determine whether defendant's conduct constituted a final decision relevant to the federal takings claim. Accordingly, the Court finds that the federal takings claim is inextricably intertwined with the Connecticut Supreme Courts judgment, and therefore barred under the Rooker-Feldman doctrine[3].

The Court is unpersuaded by plaintiffs' argument that either collateral estoppel or Rooker-Feldman is inapplicable in light of the state court's failure to consider the tests set forth in Lucas v. South Carolina Coastal

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[3] Plaintiffs argue that the *Rooker-Feldman* doctrine should not apply in light of *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), wherein the Supreme Court held that a litigant who commenced a federal claim in federal court but was relegated to state court could file with a federal court a reservation of intent to pursue the federal claim later. However, plaintiff has not persuaded this Court that such a reservation is applicable to the instant case.

Council, 505 U.S. 1003, 1019 (1992) and Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 124 (1978). As discussed previously, the Court must find that defendants' conduct constituted a final decision prior to measuring the economic impact of the defendant's action as required by Lucas and Penn Central. Accordingly, this Court will grant the defendant's motion to dismiss on the basis of the Rooker-Feldman doctrine. In the event that Rooker-Feldman does not bar this claim, summary judgment is appropriate on the basis of collateral estoppel.

Finally, even if collateral estoppel and Rooker-Feldman do not apply, summary judgment in defendant's favor is appropriate due to the lack of a final decision as required by Williamson County. The defendant's selection of plaintiffs' property as one of three sites proposed for radioactive disposal left open the possibility that plaintiffs' property would not ultimately be selected as the radioactive disposal site.

CONCLUSION

For the foregoing reasons, the defendant's motion to dismiss [document #18] is GRANTED; the defendant's for summary [document #20] is GRANTED; and plaintiffs' motion for summary judgment [document #23] is DENIED. The clerk is instructed to enter judgment in favor of the defendant and to close this case.

SO ORDERED.

/s/ Warren W. Eginton
Warren W. Eginton, Senior U.S. District Judge

Dated at Bridgeport, Connecticut this 27th day of August, 2002.

(4)

Supreme Court U.S.
FILED
SEP 13 2004
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No. 04-142

IN THE

SUPREME COURT OF THE UNITED STATES

EVANDRO S. SANTINI, *et al.*,

Petitioners,

v.

CONNECTICUT HAZARDOUS WASTE MANAGEMENT SERVICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners Evandro S. Santini and Santini Homes, Inc. hereby reply to the Opposition to Petition for a Writ of Certiorari ("Opposition") filed August 30, 2004, by the Respondent Connecticut Hazardous Waste Management Service (the "Service").

THE SANTINI PETITION FOCUSES ON CONFLICTS AMONG DECISIONS OF THIS COURT ON THREE FIFTH AMENDMENT TAKINGS CLAUSE ISSUES: WHETHER ALL ACTIVITY BY A CONDEMNOR SHORT OF ACQUISITION IS EXEMPT FROM LIABILITY; WHETHER, UNDER *PENN CENTRAL*, CONDEMNATION SHOULD BE ANALYZED IN THE SAME MANNER AS GOVERNMENT REGULATION OF PRIVATE LAND USE; AND WHETHER *ARMSTRONG* REMAINS GOOD LAW.

The Service's Opposition, like the Second Circuit's decision in this case, focuses on the fact that the Service used its power of condemnation but then reversed course before completing several prerequisites to the formal acquisition of title to the Santini subdivision. Santini's Petition, however, focuses not on what the Service did or did not do, but on three conflicts among decisions of this Court that necessarily arise if the Second Circuit's decision was correct.

The Petition first points out that if *Agins v. Tiburon*, 447 U.S. 255 (1980) and *First English Evangelical Lutheral Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987) state a categorical rule that "pre-condemnation activity" is exempt from the Fifth Amendment Takings Clause, then they conflict with *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)

and *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). These latter cases hold that takings claims should not be resolved using categorical rules, but by balancing the three *Penn Central* factors; and that takings analysis evaluates the impact of the government's action on the property and its owner, not whether the government sees its efforts through to completion. If the Second Circuit was correct, a court may adjudicate a taking claim arising from use of condemnation powers by going no further than determining whether the government action at issue was "pre-condemnation"; if so, it need not inquire into the economic impact, interference with the owner's investment-backed expectations, and whether the government was acting for its own benefit or adjusting economic benefits and burdens among private property owners.

The second conflict is betwwen the line of cases starting with *Danforth v. U.S.*, 308 U.S. 271 (1939), which hold that economic impacts on property owners due to government regulation are incidents of ownership, and *Tahoe-Sierra*'s holding that a substantial economic impact that results from condemnation is not an incident of ownership, but government interference with private land use which, if severe enough, constitutes a taking.

Finally, the Petition raises the continuing vitality of *Armstrong v. U.S.*, 364 U.S. 40 (1960), a decision whose principle – that a taking has occurred when a private land owner is forced to bear a substantial economic burden on behalf of the general public – seems tailor-made for this case, but was not mentioned by the Second Circuit, apparently due to its reliance on *Agins* and *First English.*

The Service says nothing about these conflicts. The Service's Opposition is emblematic of the type of argument that a condemnor will make to a court when

defending itself against a taking claim arising out of condemnation, but it does not address the Questions Presented, which ask how a court faced with such an argument should adjudicate the claim.

This Court has now repeatedly held that except in those limited circumstances presented in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992) (a permanent taking premised on a total loss of economically viable use), the *Penn Central* balancing analysis must be utilized. The meaning of the three factors and their interrelationship now form the core of the Takings Clause of the Fifth Amendment. If there is a categorical exception, a preemptive analysis, for "precondemnation activity," its existence and scope need to be clarified. Land owners and land use regulators need to know if *Tahoe-Sierra*'s discussion of the difference between condemnation and regulation was *dictum* or otherwise limited, and whether *Armstrong*'s principle still survives or is subsumed in the *Penn Central* analysis. As noted in the Petition, because the Fifth Amendment Takings Clause is a national minimum standard for the protection of property rights, the meaning of the *Penn Central* factors underlies every taking claim arising from the use of condemnation in both state and federal court. As the Brief of the National Association of Home Builders as *Amicus Curiae* has pointed out, condemnation is an area of constitutional law that state supreme courts are now addressing frequently, and reaching diametrically opposite conclusions.

Although not essential to the Questions Presented, the Petitioners must comment on two erroneous factual statements made in the Service's Opposition. First, the steps undertaken here by the Service were not preliminary, nor was the condemnation a process that "barely began." In fact, the condemnation at issue in this case

began in earnest in Connecticut when the state legislature in 1987 adopted the statute that directed the Service to promptly locate and condemn an in-state site for disposal of radioactive waste, in order to help Connecticut avoid substantial financial penalties that the federal government was threatening. From 1987 through June 1991, the Service worked feverishly, in secret, to identify the site to condemn. In June 1991 it identified publicly three finalists, the Santini property and two other sites in close proximity. But as testified by Susan Shimelman, Undersecretary of Connecticut Office of Policy and Management, the June 10, 1991 announcement was "the end of the process" and the Service "had no alternative but to proceed" with condemnation. Santini Petition Appendix at 44a.

The petitioners are also constrained to point out that the Connecticut courts did not make a finding of fact that the subject property "retained value" during the condemnation process or in the months afterward. In fact, in its 1999 opinion, 251 Conn. at 135 n.19, 739 A.2d at 688 n.19, the Connecticut Supreme Court made clear that it was resolving the case as a matter of state constitutional law and that it was therefore "not necessary" for it to address Santini's factual claims of economic loss. The Service's assertion (Opposition at 2, n.1) to the contrary is inaccurate – as well as emblematic of the fact that since late 1997, the Service has been in full retreat from the opinion of its real estate appraiser, Dr. Kinnard, who agreed with Santini's appraiser that once the Service announced the condemnation in June 1991, Santini had no hope of selling any of the finished houses, the completed lots, or proceeding with the remaining phase of his residential development, and this impact lasted for two years.

The Petition before the Court fits squarely into that category of cases identified in the Court's rules as eligible for a writ of certiorari, *i.e.*, a decision below that raises conflicts among decisions of this Court, and on an issue of national importance.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 2004

EVANDRO S. SANTINI, *et al.*,

Petitioners,

v.

CONNECTICUT HAZARDOUS WASTE MANAGEMENT SERVICE,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

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BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this brief as *amicus curiae* in support of the petitioners and has filed the letters of consent with the Clerk of the Court.[1]

THE NAHB'S INTEREST ARISES FROM ITS MEMBERS' CONCERNS AS TO THEIR ABILITY TO RECOVER FOR THE INJURY SUFFERED BY THEM WHEN THEIR LAND IS MADE UNUSABLE FOR SOME PERIOD OF TIME

The NAHB represents over 215,000 builder and associate members throughout the United States. Its members include people and firms that construct and supply single family homes as well as apartment, condominium, commercial and industrial builders, land developers and remodelers. It is the voice of the American shelter industry. It is, therefore, concerned with any judicial decision that calls into question the protection provided to landowners when, as in the case at bar, a court holds that the injury suffered by a landowner whose land is effectively sterilized for some period of time cannot possibly result in a compensable taking.

The NAHB has appeared before the Court as an *amicus curiae* or as "of counsel" to the landowners in a number of cases involving the rights and remedies of landowners who have been adversely affected by governmental actions. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson*

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1 No counsel for any of the parties authored any part of this brief. No person or entity other than the NAHB has made any monetary contribution to the preparation or submission of this brief.

County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987);[2] *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537 (2004).

SUMMARY OF THE ARGUMENT

Past statements by this Court set forth competing policies that only this Court can reconcile. Lower federal and state courts are hopelessly confused as how to apply these policies. This Court's grant of *certiorari* and review of the case at bar will have a widespread effect on situations involving eminent domain and, beyond that, on the allocation of the burdens resulting from governmental actions which renders land unusable for some period of time.

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2 The Court's opinion cited the NAHB's brief. 483 U.S. at 840.

ARGUMENT

I.

THE COURT'S PREVIOUS STATEMENTS CONCERNING THE BURDEN A LANDOWNER SHOULD BE REQUIRED TO BEAR PRESENT COMPETING POLICIES THAT ONLY THIS COURT CAN RECONCILE

Stripped to its essentials, the facts underlying the decision by the Court of Appeals in the case at bar involves a complete loss of use of the property owned by Mr. Santini and his company for 24 months while planning went on to determine whether the site should be acquired by the Connecticut Hazardous Waste Management Service using its power of eminent domain. This Court has made a number of statements over the years which arguably apply.

- "A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership." *Danforth v. United States*, 308 U.S. 271, 285 (1939).

- "It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken." *United States v. Causby*, 328 U.S. 256, 261 (1946).

- "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

- "Appellee argues that requiring compensation for denial of all use of land prior to invalidation is inconsistent with this Court's decisions in *Danforth v. United States* and *Agins v. Tiburon*....

  "But these cases merely stand for the unexceptional propositions that the valuation of property which has been taken must be calculated as of the time of taking, and that depreciation in value of the property by reason of preliminary activity is not chargeable to the government." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 319–320 (1987) [citations omitted].

- "In our view the answer to the abstract question whether a temporary moratorium affects a taking is neither 'yes, always' nor 'no, never;' the answer depends upon the particular circumstances of the case." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321 (2002) [footnote omitted].

The foregoing statements – contradictory on the facts before the Court – illustrate the truth of Justice Holmes's statement in his dissent in *Lochner v. People of the State of New York*, 198 U.S. 45, 76 (1905):

> "General propositions do not decide concrete cases. The decision will depend on a judgment or intention more subtle than any articulate major premise."

As a corollary, the statements in every opinion are meaningful only in the context of the factual situation which gives rise to them.

> It is a maxim not to be disregarded, that general expressions, in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control when the very point is presented for decision. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821).

Chief Justice Marshall's statement in *Cohens* and Justice Holmes's in *Lochner* are particularly appropriate in the case at bar given the repeated references to *Danforth* which involved a farm which was physically unaffected by Congress's authorization of the acquisition of flowage easements. *Danforth v. United States*, 105 F.2d 318, 139 (8th Cir. 1939).

Given the very different factual situations in the case at bar and in *Danforth*, this Court's grant of *certiorari* and subsequent review would go a long way toward reconciling the competing policies quoted above.

II.

STATE COURTS ARE, LITERALLY AND FIGURATIVELY, ALL OVER THE MAP ON HOW TO DEAL WITH ISSUES INVOLVING CONDEMNATION

The analysis provided by the Second Circuit, relying as it does upon this Court's statements in *Danforth* and *Agins*, actually raises a *per se* rule that any planning action, regardless of its duration or impact on the landowner, does not result in a compensable taking. (App. at 23a–27a.) As such, it contradicts this Court's statements in *Causby* and *Tahoe-Sierra*. This, by itself, is enough of a reason for this Court to grant its writ of *certiorari*.

The Second Circuit's decision in the case at bar does not exist in a vacuum. In fact, the law involving both the extent of the power of eminent domain and the effect of

temporary takings is in a state of flux unmatched since this Court's decision in *Berman v. Parker*, 348 U.S. 26 (1954). Thus, for example, state courts, interpreting both their own and the federal Constitutions, as well as this Court's decisions, have come to very different conclusions in the very recent past. For instance, three recent cases have held that governmental agencies did not have the power to condemn one person's private property and transfer it to another merely because of the economic benefits which would accrue to the larger community. *County of Wayne v. Hathcock*, 2004 WL 1724875 (Mich. July 30, 2004); *Bailey v. Myers*, 76 P.3d 898 (Ariz. Ct. App. 2003); and *Southwestern Illinois Development Authority v. National City Environmental, L.C.C.*, 768 N.E.2d 1 (Ill. 2002).

On the other hand, other recent cases have specifically upheld just this type of action. *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004); and *DUWA, Inc. v. City of Tempe*, 52 P.3d 213 (Ariz. Ct. App. 2003).

Contrary to the holding in the present case by the Second Circuit, other recent cases have held that pre-condemnation actions, if bad enough, can result in a compensable taking. *Merkur Steel Supply, Inc. v. City of Detroit*, 680 N.W.2d 485 (Mich. Ct. App. 2004); and *Johnson v. City of Minneapolis*, 667 N.W.2d 109 (Minn. 2003). This is, of course, not a new phenomenon. *See, e.g., Foster v. City of Detroit*, 405 F.2d 138 (6th Cir. 1968).

In an analogous situation, a number of State Supreme Courts have imposed a *per se* rule that invalid regulation, successfully invalidated through litigation, cannot result in a taking. *Torromeo v. Town of Fremont*, 813 A.2d 389 (N.H. 2002), *cert. denied*, 539 U.S. 923 (2003); *Pheasant Bridge Corp. v. Township of Warren*, 777 A.2d 334 (N.J. 2001), *cert. denied*, 535 U.S. 1077 (2002); *Sea Cabins on the Ocean IV Homeowners Association, Inc. v. City of North Myrtle Beach*, 418 S.E.2d 595 (S.C. 2001); and *Landgate, Inc. v. California Coastal Commission*, 953 P.2d 1188 (Cal.), *cert. denied*, 525 U.S. 876 (1998).

Although presented in different contexts, all of the foregoing cases have in common situations where a landowner is unable to do anything with his or her land for some period of time because of actions taken by a governmental agency attempting to further the public welfare. Regardless of the factual differences, each presents a question of when fairness requires that society at large, rather than a single landowner, should bear the cost of governmental actions. This Court's grant of *certiorari* and subsequent review in the case at bar would go a long way to providing guidance to lower courts, both state and federal, as to how the question should be answered.

CONCLUSION

The NAHB's reading of this Court's opinion in *Tahoe-Sierra* is that planning is a good thing, that the delay associated with planning cannot result in a *per se* compensable taking and that the multi-factor analysis called for by *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), applies in similar circumstances. However, the NAHB is concerned that a number of courts – federal as in the case at bar and state as cited above – are of the opinion that there is something special about the planning associated with the exercise of the power of eminent domain which should insulate it from any possibility of a taking occurring. Given the existence today of cases trying to make sense of this Court's pronouncements, gleaned from different cases having different facts decided at different times, the NAHB believes that the case at bar provides a perfect vehicle for this Court to explain that it really intended to have each case looked at on its merits when a planning delay – whether in a prosaic land use situation or an exotic eminent domain case – is presented to the courts, both federal and state.

Accordingly, the NAHB respectfully requests that the Court grant the petition for a writ of *certiorari* requested by the petitioners.

DATED: August 30, 2004 Respectfully submitted,

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